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No

21791

3505

No. 3180

United States
COURT OF APPEALS

for the Ninth Circuit

v.3505

LEO L. PHILLIPS,

P. R. ENLOE,

v.

See also
Vol. 3403

Plaintiff,

Appellant,

FLOYD OSBORNE, HARLEY RAY,
R. C. MacDONALD, E. A. REED, ARCHIE
ANDERSON, JAMES V. NEUBAUER, JOHN DOE,
RICHARD ROE and others,

Defendants-Appellees.

*On Appeal from the United States District Court
for the Western District of Washington,
Southern Division*

BRIEF OF APPELLANT P. R. ENLOE

DON S. WILLNER
WILLNER, BENNETT & LEONARD
900 Corbett Building
Portland, Oregon 97204
Attorney for Appellant

FILED

STEVENS-NESS LAW PUB. CO.



PORTLAND, ORE.

JUL 1 1969

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WM. B. LUCK, CLERK



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United States
COURT OF APPEALS
for the Ninth Circuit

LEO L. PHILLIPS,

Plaintiff,

P. R. ENLOE,

Appellant,

v.

FLOYD OSBORNE, HARLEY RAY,
R. C. MacDONALD, E. A. REED, ARCHIE
ANDERSON, JAMES V. NEUBAUER, JOHN DOE,
RICHARD ROE and others,

Defendants-Appellees.

*On Appeal from the United States District Court
for the Western District of Washington,
Southern Division*

BRIEF OF APPELLANT P. R. ENLOE

JURISDICTION

Appellant P. R. Enloe is unable to advise this Court of the basis upon which the United States District Court for the Western District of Washington, Southern Division, granted an injunction to enjoin this appellant, who was not a party to any proceed-

ings before that court, from continuing with a suit in the Superior Court of Cowlitz County, Washington.

This Court has jurisdiction of this appeal from the order of permanent injunction under 28 U.S.C. 11.

STATEMENT OF THE CASE

In *Phillips v. Osborne*, 403 F.2d 826 (9th Cir., 1968), this Court held that Leo Phillips had no standing in Federal Court under the Landrum-Griffin Act to sue for the recovery of certain funds transferred from a local union. P. R. Enloe then sued in state court for the recovery of same funds under the common law of contracts of the State of Washington. The Federal Court enjoined Enloe from continuing with the state court suit. This appeal seeks to vacate the injunction because the earlier case was decided on the issue of the standing of the plaintiff and never reached the merits of the ownership of the local union funds.

STATEMENT OF FACTS

On February 24, 1964, Local 580 was affiliated with the International Brotherhood of Pulp, Sulphite & Paper Mill Workers, AFL-CIO, hereinafter called International, and represented the employees of the Weyerhaeuser Pulp Mill in Longview, Washington (Finding of Fact 1). The Bylaws of the local union provided:

“Disbursement of Funds. Local funds may be disbursed only by first being authorized by the members voting at a regular meeting or at a spe-

cial meeting. All checks are to be signed by the treasurer and co-signed by the president or vice-president." (Art XV, Ex. 2).

On September 24, 1964, the defendants, five of the officers of the local, transferred \$40,000 of the assets of the local out of the control of the local into an escrow. This action had not been authorized by the members at a regular or special meeting (Finding of Fact 3).

On September 26, 1964, Local 580 passed two motions:

1. "This local does not ratify the action taken by the officers without the knowledge of the local and return the money." (Finding of Fact 4)

2. "That all money of Local 580, with the exception of \$500.00 for operating expenses, be divided equally among the paid up members of Local 580 as of 'today' and checks be written immediately." (Finding of Fact 4).

The defendants refused to return the money to the local. Later that morning, Local 580 disaffiliated from the International and affiliated with a new union, the Association of Western Pulp and Paper Workers (Finding of Fact 5).

Leo Phillips, a supporter of the AWPPW, brought suit in the United States District Court for the Western District of Washington, Southern Division, on October 13, 1964 to require that the decisions of the local union regarding funds be carried out. The District Court dismissed the complaint of Phillips, concluding that:

“In the particular circumstances of this case, a reasonable time within which Plaintiff was required to file his action expired upon the conclusion of the disaffiliation meeting on September 26, 1964. Since this action was not filed until October 13, 1964, it was not filed within a reasonable time as required by Section 501 of the Act.” (Conclusion of Law 11).

“While Phillips was a member of International Local 580 at the first meeting on September 26, 1964, by reason of his actions during the following meetings that day, he was not a member of the International Local 580 within the meaning of Section 501(b) at the end of that day. Hence, *Plaintiff Phillips has no standing to bring this suit.*” (Emphasis added). (Conclusion of Law 13).

This Court then affirmed the District Court, stating:

1. “In the light of Phillips’ relation with Western, other considerations lead us to agree that he, at the time of filing his suit, was not a ‘member’ of International within the meaning of Section 501(b).” *Phillips v. Osborne*, 403 F.2d 826, 831 (9th Cir., 1968).

2. “In requesting direct relief for certain union members only and not ‘for the benefit of the labor organization,’ Phillips disqualified himself from proceeding under Section 501.” (403 F.2d at 832).

3. “Hence, statutes extending federal jurisdiction, such as Section 501(b), are narrowly construed so as not to reach beyond the limits in-

tended by Congress. [citations] . . . *Such a construction is especially appropriate when, as here, the statute generally concerns rights subject to full and satisfactory vindication in state courts.*" (Emphasis added). (403 F.2d at 828).

4. *"The appellant has failed to explain why a state court may not satisfactorily determine the ownership of the funds involved in the present controversy."* (Emphasis added). (403 F.2d at 828).

Following the suggestion of this Court, P. R. Enloe then filed suit in the Superior Court of Cowlitz County against the same defendants sued in the Federal Court case. Enloe's action was based on a violation by the defendants of their contract with the other union members under the common law of the State of Washington by transferring the \$40,000 in violation of the Bylaws of the local union (R. p. 4). Defendants brought a supplemental motion and affidavit in the Federal Court seeking to enjoin Enloe, *who was not a party to the Federal action*, for seeking relief in the state court (R. p. 1).

On February 10, 1969 the District Court entered an order of permanent injunction against Enloe and this appeal followed (R. p. 25).

SPECIFICATION OF ERROR

The Court erred in entering an order of permanent injunction preventing Enloe from seeking relief in state Court.

QUESTION PRESENTED

Does the decision of this Court that Phillips had no standing to bring a suit under the Landrum-Griffin Act to recover certain funds prevent Enloe from seeking to recover the same funds under the common law of contracts of the State of Washington?

SUMMARY OF ARGUMENT

This Court has ruled that Phillips was not a proper plaintiff under the Landrum-Griffin Act. The opinion of this Court stated "The appellant has failed to explain why a state court may not satisfactorily determine the ownership of the funds involved in the present controversy."

This Court thereby invited the filing of a case in state court "to determine the ownership of the funds involved in the present controversy." By enjoining Enloe from seeking relief in state court, the District Court confused a lack of standing of Phillips with a decision on the merits of the ownership of the funds.

ARGUMENT

The Court Erred in Entering an Order of Permanent Injunction Against Enloe.

The Landrum-Griffin Act is designed to add to the rights available to union members and not to replace any rights available under state law. 29 U.S.C. 413. This Court has previously held that Leo Phillips

was the wrong plaintiff to bring a suit under the Landrum-Griffin Act to compel defendants to return to the local union the \$40,000 that they unquestionably transferred contrary to local union bylaws. The decision of this Court means that neither Phillips nor anyone else who supported the disaffiliation of Local 580 from the IBPSPMW on September 26, 1964 can bring suit under the Landrum-Griffin Act.

Neither the District Court nor this Court reached any decision determining the ownership of the funds involved in the controversy. It remains to be determined whether the defendants had a right to transfer the \$40,000 in violation of the local union Bylaws. If their action was wrongful it remains to be determined whether the motions of the local union concerning the disposition of this money can be carried out. These are the merits of the controversy which were not reached in Federal Court since the plaintiff Leo Phillips in the Federal case had no standing. The question of the ownership of the funds can and should be reached in the pending case in the Superior Court of Cowlitz County as soon as this Court removes the injunction which prevents that case from proceeding.

In addition to the \$40,000 involved in this case Local 580 IBPSPMW had certain office equipment and furniture. In the case of *International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL-CIO, et al v. Delaney, et al*, — W —, 442 P2d 250 (1968), the International Union and Local 580 IBPS-PMW sued to recover the office equipment and furni-

ture from the disaffiliating local 580 and also to forfeit the assets of the disaffiliating local 153, which represented the employees of the Longview Fibre mill in Longview, Washington. The Supreme Court of the State of Washington, by a unanimous en banc decision, dismissed that case. The result is that the office equipment and furniture of Local 580 are now in the hands of Local 580 in its new affiliation with AWP-PW. Meanwhile, the \$40,000 from the treasury of Local 580 is still in the hands of five individuals who transferred it contrary to the local union Bylaws almost five years ago.

Appellant Enloe is not seeking to relitigate any issue that was decided in the case of *Phillips v. Osborne*. He only asks that the specific language of this Court in its earlier opinion be carried out so that, as suggested by this Court, a state court may "satisfactorily determine the ownership of the funds involved in the present controversy."

CONCLUSION

The order of permanent injunction preventing P. R. Enloe from seeking relief in the Superior Court of Cowlitz County, Washington, should be vacated.

Respectfully submitted,

WILLNER, BENNETT & LEONARD
DON S. WILLNER

Attorneys for Appellant P. R. Enloe

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Vol. 3467
See
JUN 11 1969

EDOCO TECHNICAL PRODUCTS, INC.,

Plaintiff-Appellant,

vs.

PETER KIEWIT SONS' CO., and
THE B. F. GOODRICH COMPANY,

Defendants-Appellees.

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING IN BANC
FILED BY PETITIONER
EDOCO TECHNICAL PRODUCTS, INC.

FULWIDER PATTON RIEBER LEE & UTECHT
FRANCIS A. UTECHT
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Long Beach, California 90802

Attorneys for Petitioner

FILED

JUN 10 1969

WILLIAM J. LUCAS, CLERK

SUGGESTION FOR REHEARING IN BANC

Pursuant to Rule 35(b) Federal Rules of Appellant Procedure petitioner suggests the appropriateness of rehearing this matter in banc. A reversal of the decision of May 28, 1969 is necessary to maintain uniformity with the decision of this Court in International Manufacturing Co. v. Landon, 336 F.2d 723 (August, 1964). In International this Court held that in a patent infringement case a file wrapper estoppel requires that the narrowed patent claim element goes to the heart of the invention. It will be apparent from the accompanying petition for rehearing that the panel of this Court that heard this matter failed to apply this doctrine.

PLAINTIFF-APPELLANT'S PETITION FOR REHEARING

The panel of this Court in rendering its decision of May 28, 1969 made a clear and simple mistake of fact of such magnitude that the panel could not help but err in applying the law regarding file wrapper estoppel.

The panel's mistake of fact appears at the very beginning of its decision of May 28, 1969 and is embodied in the following language:

"The patented device relates to paving and is designed to control the cracking of pavement as it contracts on drying and to seal the cracks against the seepage of water. The device is a resilient strip that is, along the desired line of fracture, embedded in the pavement while it is being poured. In its cross section it is cruciform, the vertical arms tapering from the center to top and bottom and the horizontal arms being serrated. The top vertical arm provides a continuing band running close below the pavement surface which causes fracturing in alignment with it. The horizontal arms provide water stops so that water seeping through the fracture cannot penetrate to work erosion beneath the pavement. The serrations serve to anchor the strip to the cement on either side."

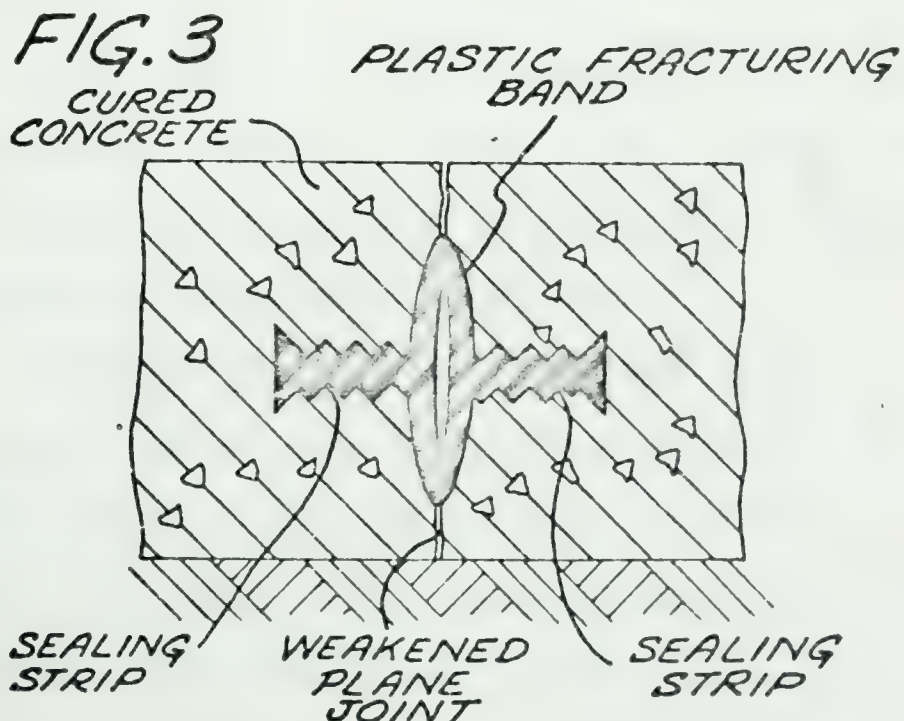
As indicated by the above language the panel considered the patented invention to be the plastic strip per se. In fact, however, the patented invention is not the strip per se, but is a weakened plane joint in a paving section. This fact becomes immediately apparent from patent Claim 1, since it is axiomatic that the invention of a patent is set forth in its claims.

"Claim 1. In a paving section, a weakened plane joint, comprising: an elongated vertically extending paving fracturing band of lesser height than the depth of said paving section, said band having its upper portion tapering upwardly for a distance greater than the thickness of said band to provide a continuous straight edge below the upper surface of said paving section, said band having its lower portion tapering downwardly for a distance greater than the thickness of said band to provide a continuous straight edge disposed above the lower surface of said paving section whereby said paving section undergoes fracturing in vertical alignment with the upper and lower edges of said band as said paving cures so as to define said weakened plane joint across said paving section; and a horizontally extending sealing strip integrally



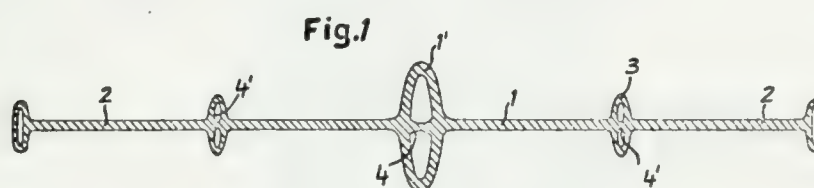
connected to each side of said band, said strips each being formed with longitudinally extending serration means that are firmly embedded within said paving as said paving cures, said sealing strips cooperating with the paving section on either side of said weakened plane joint to restrain the downward flow of water through said joint, said paving fracturing band and said sealing strips being formed of resilient material whereby relative movement is permitted between the portions of said paving section on either side of said weakened plane joint."

The invention as recited in Claim 1 is shown at Page 6 of Plaintiff-Appellant's Opening Brief reproduced immediately herebelow:





Taking the above drawing in conjunction with Claim 1 it will be apparent that the plastic strip (or band) per se is a complete nullity outside the completed weakened plane paving joint! Indeed, plastic strips used in paving joints having the same general shape of the plastic strip element of the patented combination were old in the prior art as represented by patents such as Wey Patent No. 2,901,904 appearing at Page 4 of PLAINTIFF-APPELLANT'S REPLY BRIEF and reproduced herebelow:



Wey Patent No. 2,901,904

Once the panel made the mistake of assuming that the patented invention was the plastic strip per se it was inevitable that such panel would err in applying the law regarding file wrapper estoppel. Thus, the panel after deciding the invention resided solely in the plastic band concluded that since the patent application claims did not initially recite the strip as being tapered, while the claims of the patent as issued included such tapering language, the tapering language was added to overcome a rejection on prior art. This conclusion of the panel was expressed as follows:

"Modest as the taper's contribution may be to prior art, it appears from the file wrapper to be the only contribution

- that the Patent Office was willing to concede that appellant had made."



Court stated:

"The gravamen of file wrapper estoppel, as this Court recently said in M.O.S. Corp. v. John I. Haas Co., 9 Cir., 332 F.2d 910, 141 USPQ 767, is that an applicant who acquiesces in the rejection of his claim, and accordingly modifies it to secure its allowance, will not subsequently be allowed to expand his claim by interpretation to include the principles originally rejected, or their equivalents.

As indicated by the statement made by the examiner at the time, claim 10 was not rejected because of an overly-broad definition of filter elements, or because it permitted use of a sock-type filter. It was rejected for the reason that claim 10, read as a whole, was unpatentable over other named patents. The disc-like filter element could not be the heart of the Pace invention since it, as well as the sock-type filter element, is old in the art. What was new, and what was patented, was the combination of parts in which a filter unit is correlated to the remaining elements so that the combination performs the desired skimming and filtering functions." (Emphasis Added.)



Because the International Manufacturing Co. case is on all fours with the present case, a brief examination of the facts in International is believed necessary. In International the patented combination was a water recirculation system for use in swimming pools and included a filter, a filter housing, a water passage, a screen, a buoyant weir and a pump. The questioned patent claim originally recited the filter in broad terms. During the patent prosecution the definition of the filter was narrowed to recite such filter as being disc-like. The infringer's device utilized a sock-type filter. It was the infringer's contention that since the patent claim originally recited the filter in broad terms and was later narrowed to recite the filter as being disc-like, a file wrapper estoppel existed against construing the claim broadly enough to read upon the infringer's sock-type filter.

As indicated by the above language, this Court in International rejected such contention on the basis that the disc-like filter could not be the heart of the invention since it was old in the art, and that what was new and what was patented was the combination of parts in which a filter unit of any type was correlated to the other elements of the combination so that the combination performed the desired function.

From the above review of the International case, it will be seen that the present case is exactly apposite. In the present case the patent claims did not initially recite the vertical band as being tapered. During the prosecution



of the application, however, the tapering of the vertical band was added to the claims. How could such tapering possibly be considered the heart of the invention in view of the fact that vertically tapered bands were old in the art, as represented by the aforementioned Wey and Jacobson patents?

As noted at Page 35 of Plaintiff-Applicant's Opening Brief, the tapering language was added to the claims in conjunction with newly-presented functional language to revise the form of the claims and thereby better distinguish the principle of operation of the entire combination over the cited British patent.

What was actually new and what was actually patented by appellant is set forth in the patent claims. These patent claims clearly recite a weakened plane joint comprising a length of paving and a generally cruciform resilient strip wherein the vertical band of the strip is correlated with the paving so that it effects the vertical fracture of the weakened plane joint and the horizontal band of the strip provides a flexible waterstop between the paving at the sides of the completed joint. A weakened plane joint of this description was completely new in the paving art, was a great commercial success, and was copied by the defendants.

From the foregoing argument it will be clear that the decision of the panel cries out for a rehearing. Moreover, since the panel found that the accused device "is similar in function and very similar in appearance" and "performs the identical function in substantially the same manner as does the

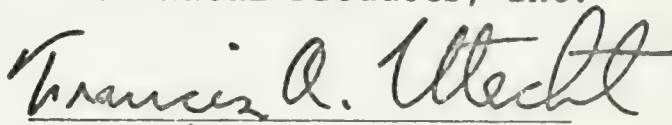


patented device," it will also be clear that the accused device infringes. Petitioner therefor prays for a rehearing and reconsideration and ultimately a reversal of the Summary Judgment. Such reversal will result in uniformity with the law in this Circuit as exemplified by the International case.

Respectfully submitted,

FULWIDER PATTON RIEBER LEE & UTECHT

By Francis A. Utecht
Attorneys for Petitioner,
Edoco Technical Products, Inc.


Francis A. Utecht



See Vol. 34-70

JUL 1 1969

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

SODERHAMN MACHINE MANUFACTURING
COMPANY,

Appellant,

vs.

THE MARTIN BROS. CONTAINER &
TIMBER PRODUCTS CORP.,

Appellee.

NO. 22281

APPELLEE'S PETITION FOR
REHEARING

Pursuant to Rule 40, Federal Rules of Appellate Procedure, Defendant-Appellee respectfully petitions the Court for rehearing with respect to and involving the items in the Court's Opinion of July 2, 1969, hereinafter set forth.

1. Barker Foundation Structure

The barker foundation structure was the structure holding the barker, as distinguished from the machine itself. The Court may have been misled by the heading in Invoice D 1141 "Repair to Barker", but the items detailed on the invoice refer unmistakably to the barker structure. Soderhamn concedes this so far as some items are detailed, and concedes that the witness, Halverson, gave testimony that this invoice

was properly chargeable to the barker structure (Brief p. 32). This Court has eliminated entirely the sum of \$3,084.32 represented by this invoice. The item should be restored.

2. Kicker, Kicker Shafts and Kicker Arms

This Court affirmed the District Court in the finding that the kicker system was defective. The District Court had before it in finding the damage, as a part of Exhibit 921-A through 921-N (which had been received in evidence, Tr. p. 356) Invoices D 1559, D 1615, D 1368, D 1368-A, D 1306, D 1306-A, D 1365 and D 1241, and included them in determining Martin's damage. The record clearly shows that these invoices had been received in evidence (Tr. 356) and also that the supporting data for these invoices had been received in evidence as Exhibit No. 931 (Tr. 187). This Court mistakenly stated that the invoices were not introduced in evidence and that Martin offered in evidence only invoice summaries which the District Court ordered stricken from the record, and consequently modified the District Court's findings by reducing the damage to \$35.00. The exhibit referred to as a summary, entitled "Survey of condition existing and remedial work performed to place same in operable condition" was offered only as an aid to the court, and was withdrawn (Tr. 351) only because a copy was attached



to and a part of Exhibit 921 A through N, already in evidence. This reduced item of damage should be restored.

3. Sheer Aprons

This Court affirmed the trial court in its finding that the sheer aprons were necessary to the unit as conceived in the contract. This Court disallowed the cost of correction in the amount of \$2,758.16 for the stated reason that the witness for Martin testified from summaries of invoices which were stricken from the record by the District Court.

The basic information from which the witness Halverson testified was contained in the exhibits and supporting business records, all of which were received in evidence as were the summaries which were offered for the convenience of the Court, all as set forth in the foregoing subject No. 2 relative to Kickers. This item should be restored.

4. Hog Conveyor

This Court sustained the District Court's finding that the hog conveyor installed by Soderhamn was insufficient and it was necessary to redesign and reinstall the conveyor. This Court further found that there was no competent evidence to support the award of \$14,063.02 for the necessary correction of this deficiency.



The Court cited as its authority for disallowing the necessary cost the fact that the evidence offered was summaries and that these were stricken from the record. Again, the basic evidence was contained in the invoice Exhibits 921-A through 921-N and were received in evidence and the basic business records in support thereof were also in Court and were received in evidence and were available to the Court and the evidence as to cost was supported by these exhibits as well as the testimony of Mr. Halverson.

In addition Soderhamn offered evidence that the reasonable cost of cure for the hog conveyor was less than the \$14,063.02, one of Soderhamn's witnesses putting reasonable cost at \$3,000 to \$5,000 (Tr. 1778) and another Soderhamn witness, Mr. Wahl, at \$5,970 (Tr. 1688). There was evidence to sustain damages and the items allowed by the District Court should be restored.


5. Prejudgment Interest

The Court allowed prejudgment interest on two items aggregating \$1,018.40, the amounts being ascertainable by simple computation and a time of definite default being ascertainable. The Court also affirmed the trial Court in a determination that Soderhamn had failed to furnish a debarking machine, or barker, for which Soderhamn had received \$81,500.00 of Martin's money. The Opinion states "The District Court properly held that Martin was entitled to a

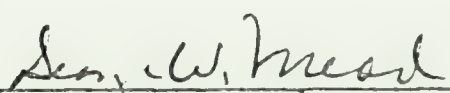
refund or abatement of the purchase price of the machine". A note in the opinion refers to a sale by Soderhamn to some third party, which the pre-trial order shows followed removal of the barker from the Martin plant on November 13, 1963, from which date Soderhamn claimed interest. Interest on this refund to which Martin was entitled in the sum of \$81,500.00 from January 1, 1964, as allowed by the trial court, should be restored.

WHEREFORE, Defendant-Appellee, Martin, prays that this Court grant a rehearing with respect to the foregoing matters, or in the alternative, modify its opinion and judgment by restoring the items of damage as found by the District Court and restoring the pre-judgment interest on \$81,500, the price of the barker.

Respectfully submitted,



Irving Rand



George W. Mead
1211 Public Service Building
Portland, Oregon 97204

Attorneys for Defendant-
Appellee

Due service of the within Appellee's Petition for Rehearing is hereby accepted in Multnomah County, Oregon, this 14th day of July, 1969, by receiving a copy thereof, duly certified to as such by George W. Mead, of Attorneys for Defendant-Appellee.

Sd. Jack H. Dunn

Of Attorneys for Plaintiff-
Appellant

I hereby certify that I have prepared the foregoing copy of Appellee's Petition for Rehearing and have carefully compared the same with the original thereof; and that it is a correct copy therefrom and of the whole thereof.

Dated this 14th day of July, 1969.



George W. Mead
Of Attorneys for Appellee

See Vol. 3501

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 22,708

UNITED STATES OF AMERICA,

Appellant,

JUL 1 1969

*See this Vol
additional
papers*

-v-

STADIUM APARTMENTS, INC., ET AL.

Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

BRIEF FOR AMICUS CURIAE - STATE OF WASHINGTON

STATE OF WASHINGTON
Slade Gorton
The Attorney General

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Assistant Attorney General
Temple of Justice
Olympia, Washington 98501

Attorneys for the
STATE OF WASHINGTON

FILED

JUL 15 1969

WM. B. LUCK, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 22,708

UNITED STATES OF AMERICA,

Appellant,

-v-

STADIUM APARTMENTS, INC., ET AL.

Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

BRIEF FOR AMICUS CURIAE - STATE OF WASHINGTON

STATE OF WASHINGTON
Slade Gorton
The Attorney General

RICHARD A. MATTSSEN
Assistant Attorney General
Temple of Justice
Olympia, Washington 98501

Attorneys for the
STATE OF WASHINGTON

THE STATEMENT OF POSITION OF
THE STATE OF WASHINGTON

The State of Washington files this amicus curiae brief pursuant to an invitation expressed in an Order of this Court dated May 8, 1969.

For its argument and conclusion, the State of Washington concurs in and adopts the position taken by the amici curiae brief filed by the State of California herein. The State of Washington has previously joined in the brief filed herein by the State of Idaho, and its adoption of the views expressed by the State of California are in addition to its position previously taken.

Respectfully submitted,

STATE OF WASHINGTON

Slade Gorton
The Attorney General

RICHARD A. MATTSEN
Assistant Attorney General
Temple of Justice
Olympia, Washington 98501

Attorneys for the
State of Washington

CERTIFICATE OF MAILING

I hereby certify that I have on this 14th
day of July, 1969, served the foregoing brief of
Amicus Curiae upon the Appellant by placing two (2)
true and correct copies of the same in the United
States mail, postage prepaid, addressed to:

Mr. Clarence D. Suiter
Assistant United States Attorney
District of Idaho
550 West Fort Street
Boise, Idaho

ATTORNEY FOR APPELLANT

151 Richard A. Mattsen
RICHARD A. MATTSSEN
Assistant Attorney General
STATE OF WASHINGTON

No. 22,272

JUN 10 1969

IN THE
United States Court of Appeals
For the Ninth Circuit

KAISER STEEL CORPORATION,
Appellant,

VS.

UNITED STATES OF AMERICA,
Appellee.

See Vol. 3470

On Appeal from the Judgment and Order of the
United States District Court for the
Northern District of California

APPELLEE'S PETITION FOR REHEARING

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JUN 12 1969

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No. 22,272

IN THE

**United States Court of Appeals
For the Ninth Circuit**

KAISER STEEL CORPORATION,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

**On Appeal from the Judgment and Order of the
United States District Court for the
Northern District of California**

APPELLEE'S PETITION FOR REHEARING

The United States of America, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, respectfully petitions for a rehearing with respect to one part of the decision entered herein on April 29, 1969, i.e., the ruling (Slip Op. 5-7) that "freight differentials" should enter into the computation of taxpayer's "gross income from mining". In result this ruling includes the costs of nonmining transportation in taxpayer's depletion base—and such inclusion is prohibited by long-standing statutory and regulatory provisions, as to all methods of computing depletable mining income.

A miner is entitled to depletion only on "gross income from mining". By statutory definition "mining" consists of extraction from the ground, specified processes in a plant or mill, and transportation—not in excess of 50 miles unless authorized by the Commissioner—from the mine to the plant or mill where the "mining" processes are applied. Section 114(b)(4)(B) of the 1939 Code; Section 613(c) of the 1954 Code.¹ In the case of iron ore and certain other ores and minerals, "mining" processes are defined as those employed to bring the crude ore or mineral to shipping grade and form, plus loading for shipment. Section 114(b)(4)(B)(iii), *supra*; Section 613(c)(4)(C), *supra*.

If a miner sells his crude mineral at the termination of "mining" processes, without exceeding the limit allowed for "mining" transportation, then his depletable mining income is, of course, his actual income. If, prior to sale, the miner applies nonmining processes or resorts to nonmining transportation, then his income from "mining" must be determined constructively. Such a constructive computation must eliminate any preference over the ordinary miner, whose depletion base is computed at the point where the raw mineral product of "mining" is ready for shipment to the market. *United States v. Cannelton Sewer Pipe Co.*, 364 U.S. 76.

¹Not even this limited amount of transportation was included in "mining" under Section 114(b)(4)(B) as originally enacted; it was added, for taxable years beginning after December 31, 1949, by Section 207 of the Revenue Act of 1950. The amendment is inapplicable to the instant case since the taxable years involved are taxpayer's fiscal years ended June 30, 1949, and June 30, 1950.

Since 1940 successive Treasury Regulations have reflected the foregoing statutory scheme and provided for constructive computations of “gross income from mining”.² In its basic features the regulatory pattern has remained substantially the same over the years. If a miner’s operations are confined to “mining” processes and “mining” transportation, his gross sales constitute his depletion base. (The 1939 Code Regulations speak of sales “in the immediate vicinity of the mine”; the 1954 Code Regulations (Section 1.613-3(b)(2)(b)) speak of sales after “application of only mining processes, including mining transportation, and before any nonmining transportation”.) If the ore or mineral is sold after nonmining processes or transportation, the Regulations provide that the miner’s depletable mining income shall be computed by reference to a representative market or field price, if such a price can be established by sales in a relevant market of a “mining” product of “like kind and grade”. Where a representative price cannot be established, “gross income from mining” must be computed under the proportionate profits method.

The instant case involves a constructive computation based on a representative market or field price. From the beginning, the regulatory provisions governing such computations have explicitly required adjustments to exclude nonmining transportation altogether from the depletion base. Under the 1939

²Treasury Regulations 103 (1939 Code), Section 19.23(m)-1(f); Treasury Regulations 111 (1939 Code), Section 29.23(m)-1(f), applicable to the taxable years herein; Treasury Regulations 118 (1939 Code), Section 39.23(m)-1(e)(3); Treasury Regulations (1954 Code), Section 1.613(b) through (f).

Code Regulations, depletable mining income is equated with the representative market or field price of a mineral product of like kind and grade, as benefited by "mining" processes, "*before*" any transportation other than transportation treated as "mining". (Emphasis supplied.) These Regulations further provide that, if the "product in its crude state is merely transported" prior to sale, then the depletion base shall be the sale price "minus the costs and proportionate profits attributable to the transportation * * *". Clearly, in keeping with the statutory definition of "mining", the 1939 Code Regulations exclude from constructive computations of mining income all transportation costs save those of moving the ore or mineral, not in excess of 50 miles, from the mine to the plant or mill where the "mining" processes are applied. Transportation after completion of the "mining" processes—for distribution, marketing or delivery—is obviously nonmining transportation, whether or not in excess of 50 miles. Accordingly, no portion of the costs of such transportation is includible in the computations.

As already noted, the definition of "mining" transportation is the same in the 1954 Code as in the 1939 Code. And the 1954 Code Regulations, like their predecessors, exclude nonmining transportation from constructive computations of depletable mining income. Thus, Section 1.613-3(c)(1) provides for the use of a representative market or field price "after the application of the mining processes (if any) actually applied and *before* any nonmining transportation, subject to any adjustments required by para-

graph (e) of this section". (Emphasis supplied.) Section 1.613-3(c)(3) and (4) provide for the use of a weighted average of competitive selling prices of minerals of like kind and grade, sold in the taxpayer's actual or potential lines of commerce, taking into account taxpayer's own competitive sales—provided, that all sales taken into account must involve minerals "beneficiated only by mining processes * * *".

In the instant decision this Court has augmented the taxpayer's depletion base by the costs of nonmining transportation to "points of consumption", to the extent that taxpayer's costs of this nature are exceeded by its competitors'.³ We submit that this is contrary to the statutory scheme and violates the explicit requirement of successive regulations that nonmining transportation shall be entirely excluded from the depletion base.

This Court invokes in support of its ruling one sentence in Section 1.613-3(e)(2) of the 1954 Code Regulations, but that sentence, read in context, does not support the ruling. Section 1.613-3(e)(2) deals with one type of nonmining transportation, i.e., purchased transportation to the customer as defined in subparagraph (e)(2)(iii), where a computation of

³The effect of this decision is to allow taxpayer to compute depletion on the *value* of the deposits attributable to their proximity to the "points of consumption." It should be noted in this connection that the Government exhibit reflecting "freight differentials" that is referred to by the Court (Slip Op. 6) is apparently one which was offered during the testimony of R. H. B. Jones, who was called as a witness only after the statement of Government counsel that "we think the evidence is irrelevant, but we are calling (*sic*) it as a rebuttal to Kaiser's value presentation." (II-R 848.)

representative market price is being made under Section 1.613-3(e). If the taxpayer applies only "mining" processes to his mineral and then ships it by "purchased transportation" to customers, it is provided that his representative market price shall be his own "delivered price" *minus* the costs of the purchased transportation. If the taxpayer does not use purchased transportation but his competitors do (and their prices otherwise qualify as representative), then the representative market price shall be the competitors' delivered prices *less* the costs of purchased transportation. The sole function of these operative provisions of Section 1.613-3(e)(2) is to ensure the elimination of purchased transportation from the computation of representative market price.

This Court relies for its ruling on the third sentence of Section 1.613-3(e)(2)(i) of the 1954 Code Regulations. That sentence, which relates only to the use of the competitors' delivered prices less costs of purchased transportation, provides that "appropriate adjustments shall be made to take into account differences in mode of transportation and distance". The evident purpose of this provision, in context, is to ensure that each competitors' actual cost of purchased transportation will be deducted from his delivered price in determining representative market or field price. This interpretation accords with the examples given at the end of paragraph (e)(2). Any other reading of the quoted language conflicts with the express requirement of all the Regulations from the beginning: That a representative price must be netted

to eliminate nonmining transportation—whether it is purchased transportation or not.

This Court's decision imports into tax depletion law a wholly new principle, unsupported by case law or administrative practice, which cannot be reconciled with either the statutory or the regulatory scheme. Nor, it may be added, can it be reconciled with the teaching of *Cannelton* that the goal of constructive computations is parity with the ordinary miner—who must compute depletion on income earned when “mining” is completed and *before* he ships his mineral to the market place.

Counsel for the United States certify that this petition for rehearing is presented in good faith and not for the purpose of delay. For the reasons given, appellant respectfully requests that the petition be granted.

Respectfully submitted,

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June, 1969.

No. 22342

JUN 2 1969

In the

United States Court of Appeals

For the Ninth Circuit

*See 6/11/69
3473
3493*

FARMERS INSURANCE EXCHANGE,

Appellant,

VS.

JOE ROSE, JR. and VERONICA ROSE, his wife,

Appellees.

Appeal from the United States District Court
for the District of Arizona

JUN 10 1969

Appellees' Response to Petition for Rehearing

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Phoenix, Arizona 85003

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No. 23548

In the
United States Court of Appeals
For the Ninth Circuit

FARMERS INSURANCE EXCHANGE,

Appellant,

VS.

JOE ROSE, JR. and VERONICA ROSE, his wife,

Appellees.

Appeal from the United States District Court
for the District of Arizona

Appellees' Response to Petition for Rehearing

The Petition for Rehearing contains nothing which was not presented in the original brief and argued to the Court. The opinion of this Court issued May 7, 1969, in this matter, correctly disposed of Appellant's contention by pointing out that this policy was not a "certified" policy. The policy provision relied upon simply isn't applicable here. Appellant is asking this Court to decide how it would

hold if the insurance company *had* certified the policy as proof of financial responsibility for the future. It should be a complete answer to point out that that is neither the fact nor the issue here.

The language of the policy provision Appellant relies on is a part of the contract between the insurer and the insured, whereby, if the policy is "certified as proof of financial responsibility for the future under the provisions of any motor vehicle financial responsibility law" and if the insurer is required to pay what it would otherwise not be required to pay under the policy, then the insured agrees to reimburse the company.

Appellant has quoted only a portion of the said paragraph in its Petition for Rehearing. The balance of the paragraph reads as follows:

"The insured agrees to reimburse the Company for any payment made by the Company which it would not have been obliged to make under the terms of this policy except for this agreement."

Clearly, if the policy is not "certified as proof of financial responsibility for the future" under the Arizona law, then the provision referred to is not applicable as between the insurer and the insured and even less so as to the innocent accident victim injured by the insured.

This provision of the policy does not limit the liability of the company to the injured third party, however, even when the policy is a "certified" one.

To be acceptable under any financial responsibility law, a "certified" policy must provide coverage at least of the required statutory minimum. The clause in the paragraph which says "but in no event in excess of the limits of liability stated in the policy" has no meaning except that the company may be required to pay more than the statutory minimum even on a "certified" policy.

Appellant argues that the Arizona Supreme Court has abolished all distinctions between policies which are certified and those which are not. Appellant is saying that there is no longer such a thing as a certified policy under Arizona law, and that therefore it doesn't matter that the policy wasn't "certified". Appellant is asking the Court to rewrite this paragraph of the insurance contract to say, in effect:

"When the provisions of the omnibus clause of a state's motor vehicle financial responsibility law obligate the company to pay upon the said policy, the company shall be liable only to the extent of the coverage required by law and the insured shall reimburse the company for any payment so made by it."

There is a vast difference between this and what the provision now says and means.

For the Court to so rewrite the policy would be contrary to the usual rules which provide that insurance policies are to be construed most strongly against the insurer and that the Court will not expand the language of the contract beyond its plain and ordinary meaning or add thereto. *New York Life Ins. Co. v. Hunter*, 138 P.2d 414; *Peterson v. Hudson Ins. Co.*, 15 P.2d 249; and *Dairyland Mutual Ins. Co. v. Andersen*, 433 P.2d 963.

To do as Appellant requests would, of course, do terrible violence to the present language and intent of such provision, as well as to the public policy as announced by the Arizona Supreme Court.

Appellant's contention that the distinctions of a "certified" policy still have specific purpose and function in Arizona then the policy provision referring thereto must still have some contractual meaning and the Appellant can't be heard to say that when the contract refers to a "certified" policy it doesn't mean it.

The insured who has a policy containing such a provision might reasonably be expected to understand that if:

1. He requests the insurance company to certify the policy as proof of financial responsibility for the future under the Arizona law, and
2. The insurance company does so certify it, and
3. He has an automobile accident causing injury to a third person, and
4. The company makes a payment on the policy which, except for their "agreement", it would not have been obliged to make, then
5. He is obligated to reimburse the company for such payments.

An insured with such a policy provision could hardly be expected to understand from it that:

1. Even though the policy was not certified as proof of future financial responsibility, then,
2. If he has an accident causing an injury to a third person,
3. The insurance company may reduce the coverage on his \$50,000.00 policy to \$10,000.00, and
4. Seek reimbursement from him.

Yet, this is what Appellant is contending should happen under this policy provision.

There are certain statutory conditions where a person must give proof of financial responsibility for the future in Arizona if he desires to retain his driver's license and/or the registration license for his vehicle. This proof is required, for example, under Arizona Revised Statutes, Sections 28-1161, 1162, 1163 and 1166, where a driver's license is suspended following conviction of a serious traffic offense or because the driver has failed to pay a judgment arising as a result of an automobile accident.

Arizona Revised Statutes, Section 28-1167, provides that proof of such financial responsibility may be given by filing a certificate of insurance as provided in Arizona Revised Statutes, Section 28-1168 or in Section 28-1169, which applies to nonresidents.

Arizona Revised Statutes, Section 28-1168, provides:

“Proof of financial responsibility may be furnished by filing with the superintendent the written certificate of an insurance carrier duly authorized to do business in this state certifying that there is in effect a motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility. The certificate shall give the effective date of the motor vehicle liability policy, which date shall be the same as the effective date of the certificate, and shall designate by explicit description or by appropriate reference all motor vehicles covered thereby, unless the policy is issued to a person who is not the owner of a motor vehicle.

...”

It may be noted at this point that these “certified” policies are required only for drivers who have, for some reason, placed themselves in the category of poor or bad risks. It is difficult to imagine an insurance company writing a “certified” policy for more than the minimum required coverage where the insured’s license is suspended.

It is also important to note that under Arizona Revised Statutes, Section 28-1171, the insurance company cannot cancel its certified policy until ten days after it has filed a notice of termination with the superintendent.

The case of *Dairyland Mutual Ins. Co. v. Andersen*, 433 P.2d 963, was decided by the Arizona Supreme Court several months after the case of *Sandoval v. Chenowith*, 428 P.2d 98. In the *Dairyland* case, the Arizona Supreme Court

made it clear that the special purposes and characteristics of "certified" policies are still very much in force and effect.

In that case the insurance company relied upon a policy provision almost, if not exactly, identical to the one Appellant relies on here. In the *Dairyland* case, the insurance company said, in effect, "Under the policy provision the insured must reimburse us if we are required to pay; therefore, we are not liable to the insured and therefore not liable to the accident victim injured by the insured".

The Court said at Page 966:

"... We reject such a tenuous argument as obviously contrary to the public policy of this state. The purpose of certification as proof of financial responsibility for the future, under A.R.S. § 28-1168 of the Arizona Safety Responsibility Act, is to supply financial responsibility against which a person damaged or injured by the insured's act may have recourse. To hold with *Great Basin* would be to completely destroy the purpose of certifying proof of financial responsibility."

The Court then proceeded to order that if the trial court determined that the policy was "certified as proof of financial responsibility" then it was to enter an appropriate judgment in favor of the insurer and against the insured, based on said policy provision.

Allstate Insurance Company v. Dorr, No. 22443, was decided by this Court on May 2, 1969, just five days before the opinion was issued in this case. The opinion, written by Judge Madden, dealt with the Arizona motor vehicle financial responsibility law. The Court opinion there, written by Judge Madden, briefly, but correctly, stated that the liability of the insurance company is not limited to the \$10,000.00 minimum, but extends to the full extent of the policy limits. The Court, in its opinion, said:

“ . . . Mr. Dorr, as the father of his deceased son . . . obtained a judgment . . . for \$20,000. . . . Mr. Dorr would have been able . . . to collect from Allstate *up to the limits of its policy* . . . his judgment against” the Defendants. (Emphasis Supplied.)

Appellant struggles mightily to find some “implication” in the *Sandoval* opinion which would support its contention. First the Appellant “presumes”, Page 13 of its original brief, that the policy in the *Sandoval* case had no provision such as it relies upon. Then, in its Petition for Rehearing it purports to quote language of the Arizona Supreme Court in the *Sandoval* opinion, when, in fact, it is quoting the language of the California court in *Globe Indemnity Co. v. Universal Underwriters Ins. Co.*, 20 Cal. Rptr. 73, which is quoted, in part, in the Arizona decision.

The Arizona Supreme Court, in its language in the *Sandoval* case, did not imply anything such as Appellant suggests, but it expressly held the company liable to the full extent of the policy limits and made it clear that the result would be no different under a “certified” policy. In doing so, it reversed the lower court and reiterated the strong public policy of the State of Arizona to afford maximum protection to the innocent victims of traffic accidents.

Appellees respectfully urge that the Petition for Rehearing be denied.

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JUN 2 1969

Nos. 22397 - 22398A

In The
United States Court of Appeals
For the Ninth Circuit

FILED

No. 22397

WM. B. LUCK, CLERK

UNITED STATES OF AMERICA,

Appellant,

vs.

CALIFORNIA PORTLAND CEMENT COMPANY, a corporation, Successor-
in-Interest to ARIZONA PORTLAND CEMENT COMPANY, a corporation,

Appellee.

No. 22397-A

CALIFORNIA PORTLAND CEMENT COMPANY, a corporation, Successor-
in-Interest to ARIZONA PORTLAND CEMENT COMPANY, a corporation,

Cross-Appellee.

vs.

UNITED STATES OF AMERICA,

Cross-Appellant.

No. 22398

UNITED STATES OF AMERICA,

Appellant,

vs.

CALIFORNIA PORTLAND CEMENT COMPANY,

Appellee.

No. 22398-A

CALIFORNIA PORTLAND CEMENT COMPANY,

Cross-Appellant,

vs.

UNITED STATES OF AMERICA,

Cross-Appellee.

CALIFORNIA PORTLAND'S PETITION FOR REHEARING

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Pursuant to Rule 40, FEDERAL RULES OF APPELLATE PROCEDURE, petitioner respectfully requests a rehearing of this Court's decision entered June 4, 1969, for the following reasons:

- I. THE COURT'S RELIANCE ON A NEW REGULATION OF RESPONDENT, PROMULGATED WHILE THE CASE WAS ON APPEAL, APPEARS MANIFESTLY INEQUITABLE TO PETITIONER AND TO ESTABLISH A VERY UN-DESIRABLE PRECEDENT.

We believe that the basis for the Court's opinion on the bagging question presents an important issue of judicial procedure. For many years, the pertinent regulation has been Section 39.23(m)-1(e) of Treasury Regulations 118 (herein called "Regulation 118").^{/1} This regulation survived several reenactments of the statute, was made applicable to the 1954 Code by respondent,^{/2} and was regarded as not being changed by both the Treasury and Congress in the 1960 formulation of the statutory "kiln-feed" cut-off point applicable here.^{/3} At all times prior to and including the briefing

1. Regulation 118, made applicable to the 1954 Code by T.D. 6091, 1954-2 C.B. 47, is substantially identical to the first regulations adopted under the 1939 Code--Reg. 103, § 19.23(m)-1(e) and, thereafter, Reg. 111, § 29.23(m)-1(e).

2. Ftn. 1, supra.

3. Hearings Before the House Committee on Ways and Means on Mineral Treatment Processes for Percentage Depletion Purposes, 86th Cong., 1st Sess. p. 47 (March 5, 1959).

of this appeal, both parties treated said regulation as controlling,^{/4} and it was the basis for the District Court's decision in favor of petitioners. On July 26, 1968, however, 17 months after the District Court's decision adverse to it,^{/5} the Government superseded said Regulation 118 by a new regulation (Reg. § 1.613-3) which specifically adopted the result it had attempted and failed to obtain in the District Court. Moreover, respondent's new regulation stated that it was retroactively applicable for the proceeding 15 years.^{/6}

In our respectful opinion, it is not consistent with the essential justice of the judicial system to allow a litigant, once it has lost a case in the trial court, to promulgate new rules in its favor which control the appeal. The role of courts is to apply law to facts, and this process cannot function in a meaningful manner if one side has the power to change the rules in mid-stream.

This court believed the new regulation could be given retroactive application because of Dixon v.

4. See, e.g., the Government's opening brief on appeal, p. 18.

"The specific methods by which 'gross income from mining' shall be computed are set forth in the long-standing provisions of Section 39.23(m)-1(e)(3) of Treasury Regulations 118 (1939 Code)."

5. Filed February 27, 1967. No. 22397, I-R. 117.

6. To taxable years beginning after December 31, 1953.

United States, 381 U.S. 68 (1965); Pollack v. Commissioner, 392 F.2d 409 (5th Cir. 1968); and United States v. Fenix & Scisson, Inc., 360 F.2d 260 (10th Cir. 1966). None of these cases, however, involved circumstances with any parallel to the present case.

In Dixon, the Government retroactively withdrew its acquiescence to a Tax Court decision. It specifically excepted from retroactive effect, however, the period between the announcement of its acquiescence and the withdrawal. 381 U.S. at 72. In Pollack, the court's main emphasis was on the express language of the statute, but it did state that a regulation could be retroactively applied where no prior regulation had existed. In Fenix, there also was no prior regulation, and there was an earlier revenue ruling which was nearly identical to the new regulation.

It would appear that the discretion of the Government to apply rulings or regulations retroactively should vary substantially, depending on the factual circumstances. Thus, for example, it should have more freedom with respect to retroactivity where a ruling or acquiescence is involved, or where a new regulation does not supersede a prior, valid regulation of long standing. The authorities establish this view.

In International Bus. Mach. Corp. v. United States, 343 F.2d 914 (Ct. Cl. 1965), the court held that the Government's discretion, provided in 26 U.S.C. § 7805(b), to determine the retroactive effect of new rulings or regulations was not unlimited. There, a ruling applied retroactively to I.B.M. denied it a prior year excise tax exemption which had been allowed to Remington Rand. The court held that retroactive effect would not be permitted and stated:

"Implicit, too, in the Congressional award of discretion to the Service, through Section 7805 (b), is the power as well as the obligation to consider the circumstances surrounding the handing down of the ruling--including the comparative or differential effect on the other taxpayers in the same class. . . . Equality of treatment is so dominant in our understanding of justice that discretion, where it is allowed a role, must pay the strictest heed.

" . . . [T]he Commissioner's exercise of discretion is reviewable . . . for abuse, in the same way as other discretionary administrative determinations. The Internal Revenue Service does not have carte blanche. Its choice must be a rational one, supported by relevant considerations." 343 F.2d at 920. (emphasis added)

To date, the proper treatment of bagging has been judicially considered in more than 8 cases, and all have applied Regulation 118. United States v. Ideal Basic Industries, 404 F.2d 122 (10th Cir. 1968), cert. denied. U.S., (1969) was litigated slightly



ahead of the instant case, and the Tenth Circuit's decision (issued August 15, 1968) reached the same result as the District Court below and the majority of the other decisions deciding the bagging issue under Regulation 113. It is apparent, therefore, that retroactive application of the new regulation to petitioner does not give it equality of treatment with other taxpayers in the same class. In addition, the "equality of treatment . . . dominant in our understanding of justice" must mean that one litigant cannot have the power to retroactively apply new rules to its litigation while on appeal.

The Court states (Op. 4) that the new regulations "have the force and effect of law." If this is true of the new regulation, it certainly must be true of the superseded regulation which, prior to supersession, was in effect for many years and survived several reenactments of the statute. Clearly the Treasury, however, as an administrative tribunal, has no power to retroactively change prior law.

The Government's power to retroactively amend a prior, valid regulation of long standing was considered by the Supreme Court in Helvering v. R. J. Reynolds Tobacco Co., 306 U.S. 110 (1938). In holding that,

under the substantially similar predecessor to § 7805(b), the Treasury could not retroactively amend its long-standing regulations, the court stated:

"Since the legislative approval of existing regulations by reenactment of the statutory provision to which they appertain gives such regulations the force of law, we think that Congress did not intend to authorize the Treasury to repeal the rules of law that existed during the period for which the tax is imposed." 306 U.S. at 116.

Similarly, in Broadcasting Publications, Inc. v. District of Columbia, 313 F.2d 554, (D.C. Cir. 1962), the court held:

"Where valid regulations are in force at the operative date of the tax, new or amended regulations are not to be given retroactive effect." 313 F.2d at 556.

No case has been found which involved the extreme facts of a prior valid regulation of long standing and relied on by a lower court being superseded by a new regulation on appeal, months after the lower court's decision. In less extreme circumstances, however, the Sixth Circuit in Commissioner v. Goodwyn Crockery Co., 315 F.2d 110, 113 (6th Cir. 1963), refused to consider as binding a new regulation promulgated after the lower court's decision.

For the above reasons, we respectfully submit that no weight whatever should have been given to the Government's last minute new regulation, and that the

case should have been judged exclusively on the regulation applicable at the time of the District Court's decision. In this regard, we shall not repeat the discussion of bagging at pp. 30-35 of our opening brief, except to emphasize:

(i) Regulation 118 specifically states that the computation must work back from "the first marketable product."

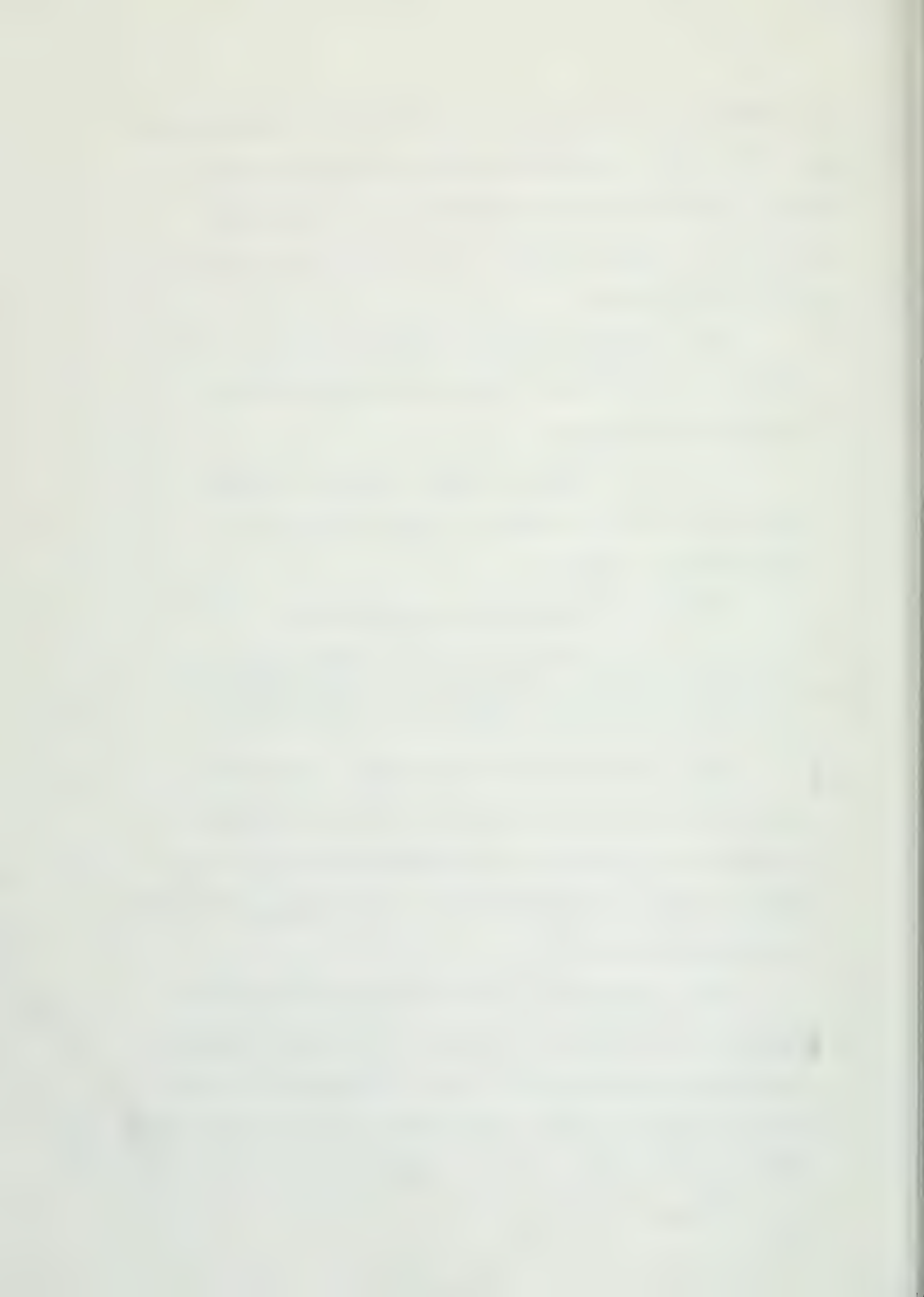
(ii) The District Court found as a fact that bulk and not bagged cement was the first marketable product.

(iii) As stated by the Ideal court:

"Equally compelling is the simple logic that bulk cement is the first marketable product, bagged cement is the second marketable product. . . . " 404 F.2d at 126.

(iv) To supersede "the first marketable product" with the "group of products" concept introduced in the new regulation, results in two constructive depletable prices for a single fungible product--kiln feed.

(v) The weight of authority on the point supports the District Court. This court thought certain cases pertaining to nonintegrated miners were distinguishable. All the cases cited involved the same question, however--determination of the



first marketable product. Once such determination was made, the nonintegrated cases directly applied the depletion percentage, while the integrated cases then had to use this starting point to work back under the proportionate profits formula.

(vi) The Government's petition to the United States Supreme Court for certiorari in the most recent case favoring petitioner--Ideal Basic Industries, supra--was denied on June 2, 1969.

II. THE DISTRICT COURT'S FINDINGS ON THE CASH DISCOUNTS ISSUE WERE NOT CLEARLY ERRONEOUS.

The District Court found that petitioner's discounts were offered for the purpose of inducing prompt payment of its invoices and not to induce sales of its cement, and that these were cash discounts rather than trade discounts.^{/7} These findings were supported by substantial evidence^{/8} and, therefore, were required to stand unless clearly erroneous. FED. RUL. CIV. PROC. 52(a); Bloom v. United States, 272 F.2d 215 (9th Cir. 1959).

In apparently holding that the findings were clearly erroneous, this court made the following points:

7. F.F. 13

8. Pltf. Ex. 20 B-C, 232-37, 388; Pltf. Ex. 24, p. 4.



(i) In Southwestern Portland Cement Co. v. United States, 22 AFTR 2d 5874, 5877 (C.D. Cal. 1968), that District Court held similar discounts to be trade discounts.

(ii) The discount did not represent a fair interest rate.

(iii) The discount was rarely disallowed.

(iv) The discount was prevalent in the industry.

Southwestern Portland involved key subsidiary findings not present here:

"The discounted price was offered to customers primarily to encourage purchases in competitive situations. . . . and was not a device to obtain prompt payment from customers. . . . " /⁹

In the present case, the uncontroverted testimony was that the purpose of petitioner's discounts was to induce collection of its accounts.^{/10} Moreover, it does not appear that petitioner should be bound by findings of fact in a case in which it was not a party. The Government, however, has been a party to three other cases (two involving the Southern California market)

9. F.F. 23 and 25.

10. E.g., Pltff. Ex. 20-B, 222, 235.

in which similar discounts were held to be cash rather than trade discounts.^{/11}

The question of a fair interest rate has appeared in the Government's Rev. Rul. 60-257, 1960-2 C.B. 197 (not applicable to taxable years ending prior to January 1, 1960) and Rev. Rul. 55-13, 1955-1 C.B. 285. At most, this factor would appear only of evidentiary value on the question whether the purpose of the discounts was to induce payment or to induce product sales. This court, reviewing the voluminous record, concluded that petitioner's discount, amounting to about 5-1/2% of sales, "was allowed for prepayment of anywhere between 1 and 20 days."^{/12} Actually, accounts were considered discounted if paid by the 10th of the month following billing and delinquent if not paid by the end of said month.^{/13} Accordingly, the prepayment period was at least 20 days, and longer where a customer did not wait until the last minute to take the discount.

11. California Portland Cement Co. v. Riddell, 59-1 U.S.T.C. para. 9156 (F.F. 14) (S.D. Cal. 1958), rev'd. on other grounds, Riddell v. California Portland Cement Co., 297 F.2d 345 (9th Cir. 1962); Riverside Cement Co. v. United States, 58-2 U.S.T.C. para. 9905 (F.F. 8) (S.D. Cal. 1958); Standard Lime & Cement Co. v. United States, 329 F.2d 939 (Ct. Cl. 1964).

12. Op. 20.

13. Pltf. Ex. 20-D 470.

Petitioner's discount was approximately 2-1/2 times the "2% 10th day, net 30 days" terms common throughout many vendor industries. There are numerous small purchasers in the construction industry, however, many of whom are not good credit risks. Accordingly, the size of petitioner's discount, in this industry context, is entirely consistent with petitioner's stated purpose to use its discount to effect collection of its accounts.^{/14} Obviously, where the discount is of sufficient size to be meaningful, it will be an inducement for customer payment ahead of other suppliers, and petitioner's bad debts experience was extremely low.^{/15}

The court also thought the fact that petitioner's discounts were rarely disallowed was indicative of a trade discount, allowable in all events. The only direct testimony, however, was that the discount was used and was effective to induce payment. It certainly had this effect, because approximately 95% of petitioner's accounts were paid by the end of the month following billing.^{/16} There would have been no reason for such rapid payment if plaintiff's customers had viewed the discount as a mere price making device.

14. N. 10, supra.

15. Pltf. Ex. 20-D at 234.

16. Pltf. Ex. 20-B, 234.



The court's final point was that the discount was prevalent in the industry. We respectfully submit that this should not be material, because an industry could have a uniform credit policy, as well as a price policy. Thus, for example, if all suppliers had followed a "2% 10, net 30" policy, the fact of a cash discount would have been unquestioned.

The Government's principal evidence was the theorizing of an accounting professor, who admitted his familiarity with the cement industry was limited to prior testimony in two cases as a paid witness for the Government.¹⁷ In contrast, petitioner's witnesses were experts in the industry, and their testimony was supported by the objective fact of petitioner's excellent collection experience, as well as judicial findings in two earlier cases involving the same market area. In these circumstances, we submit that the District Court's findings should not be held to be clearly erroneous.

Respectfully submitted,

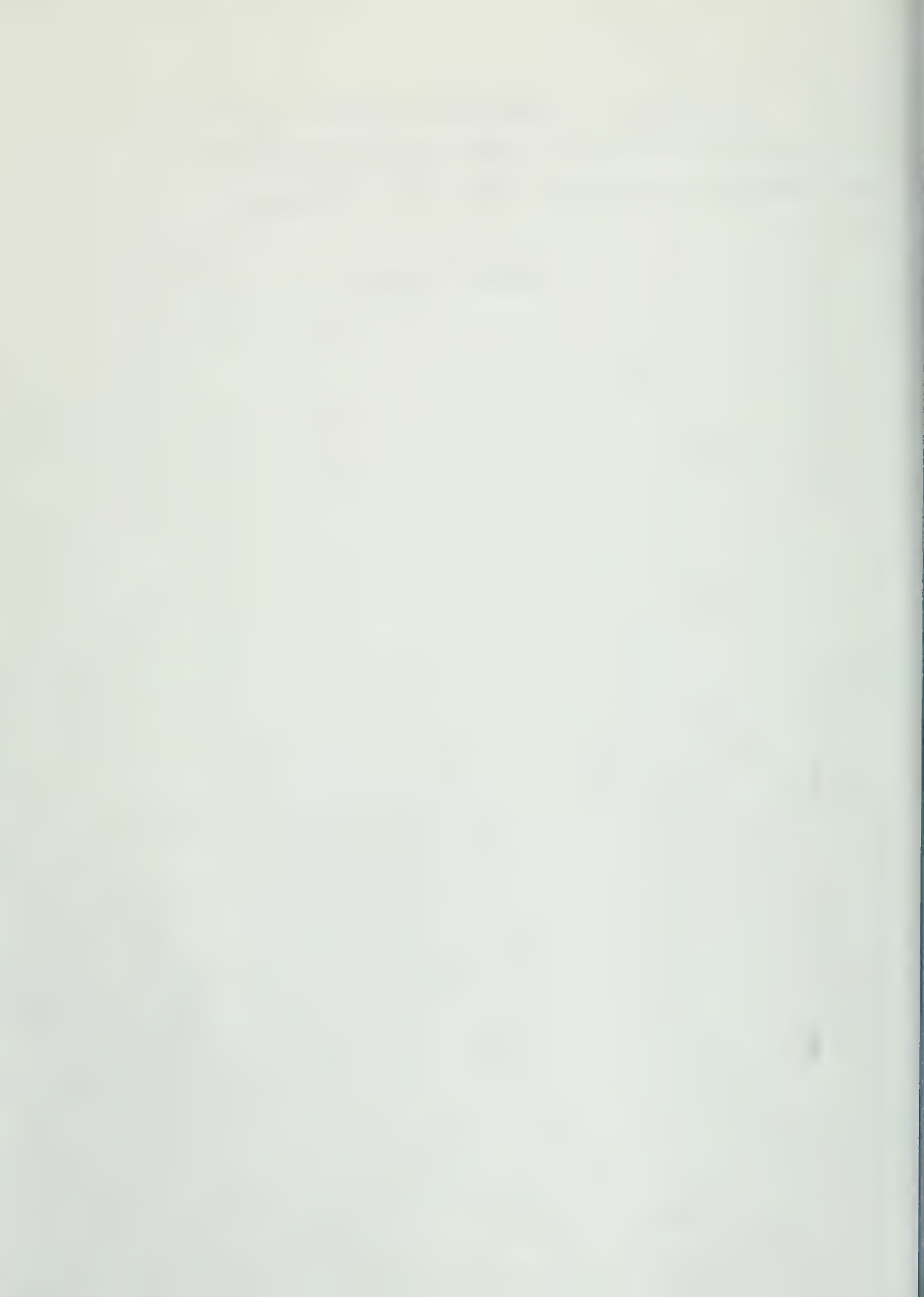
DATED: June 17, 1969

JOSEPH D. PEELER
STUART T. PEELER
PETER C. BRADFORD
MUSICK, PEELER & GARRETT
Counsel for Petitioners

17. Pltf. Ex. 20-A, 9, 18-19, 23.

I am one of counsel for petitioners herein
and I certify that in my judgment this petition is
well founded and it is not interposed for delay.

Peter C. Bradford



IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL O. LAW,

Appellant,

vs.

JOINT CHECKER LABOR RELATIONS COMMITTEE,
SAN FRANCISCO, an unincorporated association,
PACIFIC MARITIME ASSOCIATION, an unincorporated
association, ILWU, an unincorporated labor union,
ILWU, LOCAL 34, an unincorporated labor union,
MATSON TERMINALS, INC., a California corporation,
et al.,

Appellees.

JUL 7 1989

*See
3485*

On Appeal from the United States District Court
For the Northern District of California
Southern Division

SUGGESTION THAT REHEARING BE CONSIDERED
IN FULL COURT - RULE 35 (REHEARING IN BANC)

PETITION FOR REHEARING

HOWARD B. CRITTENDEN, JR.
111 Sutter Street, Suite 817
San Francisco, California 94104
EXbrook 7-5288

Attorney for Appellant

FILED

TO THE HONORABLE UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT:

The appellant, RUSSELL LAW, herewith suggests it is appropriate:

- 1) The rehearing in this matter be considered by the full Court under Rule 35 as a rehearing in banc,
 - a) as it is necessary to obtain a uniformity of decisions;
 - b) as this case involves a question of exceptional importance.

2) The important facts appearing in the record and stated with citations to the record in Appellant's Opening and Reply Briefs and the points of law raised were overlooked in the opinion published by this Court, and appellant petitions for a rehearing of the decision of June 18, 1969. The following facts do not appear in the opinion:

LAW was barred from his livelihood of over 9-1/2 years and his sole means of support as a full time shipclerk upon a trial in absentia, without notice or hearing or an opportunity to appear or defend himself or present his side, upon the charge of only one of over a hundred shipclerk employers in this Port. He sought every remedy and was refused it. He filed this Sec. 301 action.

The record shows LAW was dispatched for a single day to Matson Terminal, Inc. as a shipclerk and worked as such loading the S.S. Dant on November 23, 1964, and was paid for only 7-1/2 hours, not for the 8 hours he worked. He took up this pay shortage and sought throughout to exhaust his remedy, without so much as a hearing at any stage. On December 3, 1964, the Matson Terminals had this

employer's association PMA forward charges to defendant Local 34 (of which LAW was not a member). Local 34 sent a copy to a former address of his, although he had lived in his home for several years and his correct address was shown on several yearly W-2 forms and his checks to the Union for their charges carried his proper address, and the Union elected dispatcher at the Oakland Hiring Hall had his telephone number and saw him daily.

On January 13, 1965, LAW was sent by the dispatcher to the Union Hall at San Francisco where he met with a local Union Committee for but a few minutes and was told of the charges of Matson Terminal. The record shows the brevity of the conference and the individual members testimony shows the differences of their understanding as to what LAW explained had happened. He was led to believe these union members intended to protect him and fight his cause. The first step in the grievance procedure is the defendant, Joint Checker Labor Relations Committee, in which both the employer representatives and the employee representatives each must agree for there to be any conviction of LAW, or any action.

On January 13, 1965, one of these Union members, HERMAN, stated to the Port Committee of which he was an employee member, that LAW admitted the charges as factual, although the other Union members of the Committee as for example ROBB testified he understood there was some kind of mistake in loading when LAW was trying to follow the direction of his supervisor, LAW discovered the mistake, reported it and it was corrected. Although it took both votes of the employer and employee members, the testimony was the Union members did not vote and acquiesced in LAW being convicted and barred from any future employment

as a shipclerk by any of the more than a hundred employees of ship-clerks in this Port.

There was clearly a violation of the duty of the exclusive statutory bargaining agents to LAW and actionable under Vaca v. Sipes, 386 U.S. 171, in a Sec. 301 action. This statutory agent, the defendant I.L.W.U., did nothing, at any time. It purported to delegate its discretion and judgment as well as responsibility to defendant Local 34 whose book members alone elected the Port Committee employee representatives and even the dispatcher who gave out the jobs.

The record clearly points up the situation:

1) Local 34 book members are those "registered" and who are then dispatched in priority to those such as LAW who are not permitted full book membership. Book men are dispatched for the duration of the job while the Ship is in Port while LAW and other "social security men" (book men have registration and registration members and non-union men are listed by social security numbers) have but a dispatch for a single day. Not only do Union members alone elect the dispatcher who gives out the job but also the employee member of defendant Port Committee. Fringe benefits are generated on all employee's pay by individual employers but used solely for full book members of Local 34, not for LAW and the other social security men.

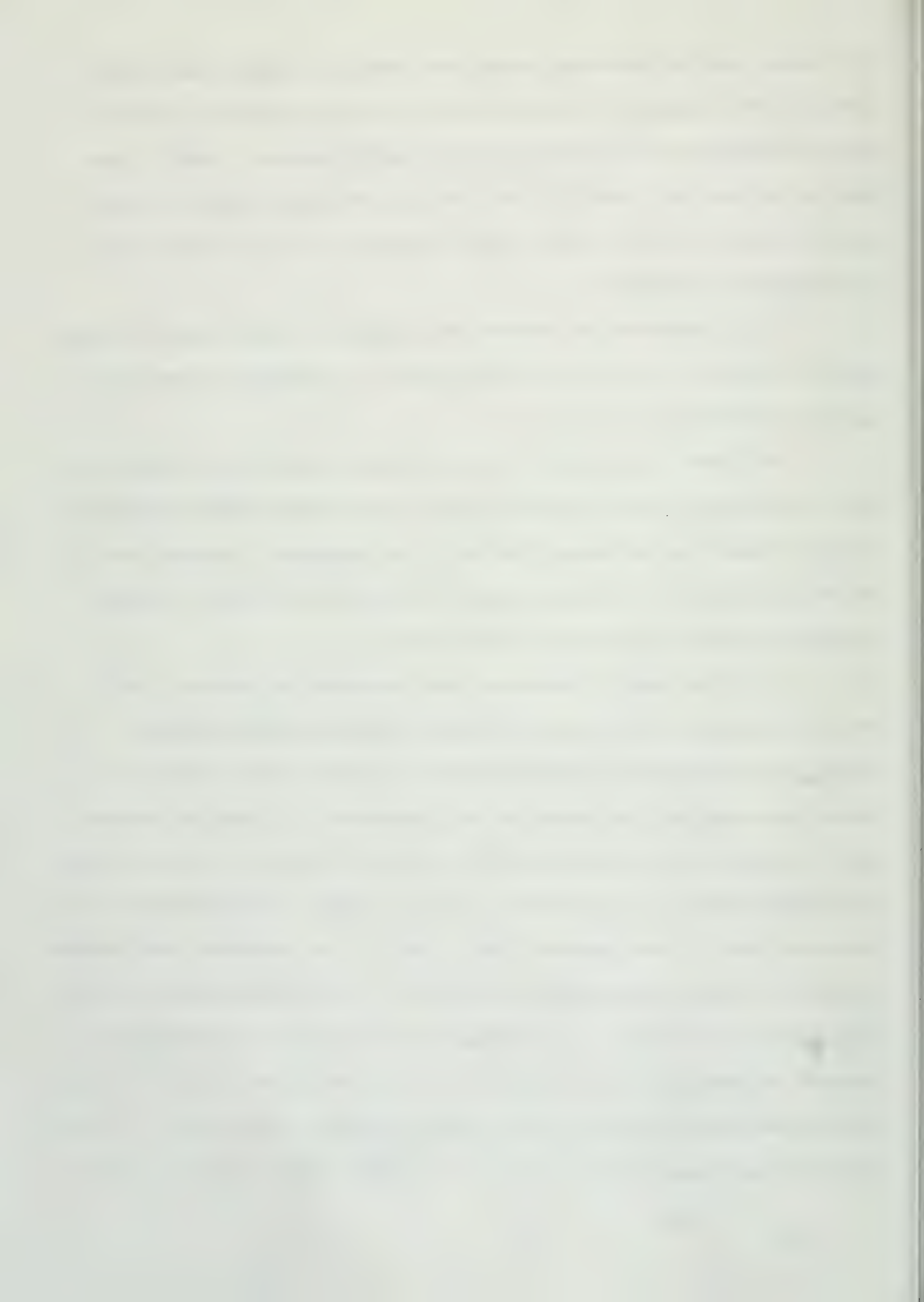
2) The provisions of the written collective bargaining agreement as published are not followed. Secret oral understandings, customs from breaches of this published written contract and undisclosed actions of the various committees are enforced as the bargaining agreement. This case points up the fact an unpublished and yet unsigned document as to employer's

grievances against individual shipclerks had been applied for several years in such matters. This document was not signed or published until the latter half of 1966, long after LAW'S matter. Had it been applied to him, he could not have been adjudicated guilty as it applied to offences of pilfering, work stoppage, etc., not mere errors in judgment or negligence.

3) A different procedure was applied to Union book men than applied to social security (non-Union) men on employer grievances against individual shipclerks.

4) Even the minutes of the defendant Committee recites that since LAW was a social security man, the defendant PMA demanded his punishment be permanent barring from dispatch. Although this harsh punishment was rarely applied, it shows a different standard applied to Union and non-Union shipclerks.

5) The laws of Congress have attempted to prevent a different treatment of Union and non-Union employees and spell out clearly the maintenance of membership provisions, and require a Union to accept all employees to full membership if they pay reasonable initiation fees and keep up their dues, if there are any provisions as to maintenance of membership in the contract. No employer can favor nor can a Union require him to favor, one employee over another because of Union membership or lack of it. The PMA and I. L. W. U. until 1952 had a provision in this bargaining agreement granting preference of employment and dispatch to Union members. This was held illegal and void in NLRB v. Waterfront Employer, 9 Cir, 211 F 2d 946. To avoid and frustrate this decision, the PMA and I. L. W. U. made



another contract granting preference in employment and dispatch to those illegally registered and picked a seemingly innocent priority date of employment in 1952 before the N.L.R.B. decision. They also wrote into the contract that "registration" which is the key to this special benefit would be granted on the "joint consent" of the PMA and the Union. Of course, only slightly over half of the regular working force are then admitted into the local Union as full book members and, of course, only full book Union members are fully registered. Thus, on the waterfront book men mean "registered" which is the key to priority of dispatch and employment, receipt of fringe benefits including the jointly construed Health and Welfare Fund, Pension Fund and the multimillion dollar Mechanization Fund, and even vacation pay. The Union keeps its doors closed to all but a select few. Where there is selection, the bourgeois (of which LAW is one as the record shows he was formerly in the used car business on his own account) are not admitted to a predominantly proletarian Union. Even the grievance procedure varies depending on whether the shipclerk is a full book member of the Union, as does the consequences.

6) Whether or not LAW'S conduct on November 23, 1964 in his shipclerk's work on loading the Dant merits discipline under the applicable collective bargaining agreement depends on what that agreement is. This Court's decision, as does the trial court's decision, completely avoids this. In any event, no man can be tried in absentia without adequate notice of the charges and without an opportunity to defend himself. Any grievance procedure cut from this material is too foreign to our concept of fair play to stand. See Humphry v. Moore,

375 U.S. 335. Any statutory collective bargaining agent who delegates its responsibility and judgment to another and which in this case is Local 34, leaves the protection of non-Union employees to such as appears in this record of a desultory, deceptive and improper representation, as shown in the record where the various Union members understood LAW'S explanation differently, in but a few minutes of meeting with him, promised to protect him and defend him and represent him and then went in and in fact voted against him. For the Committee to be able to act, it needed both the employer representative's vote and the employee's members vote.

ADDITIONAL MATTERS

It may well be that a non-Union shipclerk is, as respondent's counsel stated at the oral argument, a third-class citizen. He may have no rights the employer or Union or statutory exclusive bargaining agent are bound to respect. However, he is not outlawed and civilly dead. He should have a right to come to this Court and have the relevant facts as stated in the record and cited in his counsel's brief included in the Court's opinion. If, on the matter of law on these facts, the Court does not agree in whole or in part, it should so state the law involved:

1) Is it the law a non-Union shipclerk solely because he is not admitted to Union book membership is to be subject to different grievance procedures? Different and more harsh punishment?

2) May any shipclerk be subject to trial in absentia, without adequate notice, without an opportunity to appear and defend himself and

be forever barred from his sole means of support of many years?

3) May a shipclerk be called into a Union Committee meeting for fifteen minutes, so short that the various committee members each understood it differently, be told he is not to blame and he would be defended and protected, and then have these same committee men go into a meeting of another committee and then permit him to be convicted and to have a vlid action of that committee, join in barring him from the sole source of his livelihood, in the first step of the grievance procedure? When he attempts to seek the next step can he be denied all other remedies? Is this fair and adequate representation by the exclusive statutory bargaining agent?

4) May a collective bargaining agreement make full book members of Local 34 superior first-class citizens, let the Union arbitrarily close its doors to about half of the full time working force dependent on employment as shipclerks for a livelihood, require "registration" to be by "mutal consent" of the employer's association and the local Union, so only full book Union members in this working force have priority of dispatch and employment as "registered", get the sole benefit of all fringe benefits and priority of treatment in grievance; provide for election of the dispatcher and representatives on the Port Committee solely by full book members, not by all of the full time members of the working force?

5) Can the collective bargaining agreement be so drafted as to perpetuate this special privilege to Union full book members not granted to others?

6) Can a written collective bargaining agreement be published, and then have the Union and Employers Association claim this is not in effect, but is superceded by and the real bargaining agreement is a secret oral agreement not yet reduced to writing and not yet published, changed by custom and practices in violation of the written published agreement and by minutes of the various committees, creatures of the written agreement? What is the applicable contract? Which grievance procedure is followed? As to shipclerks discipline and punishment on employer's grievances, which is applicable?

7) How far can non-Union employees be treated differently than full book members of the Union without violating the laws of Congress on maintenance of Union membership or preference of one over another because of lack of a particular Union's membership?

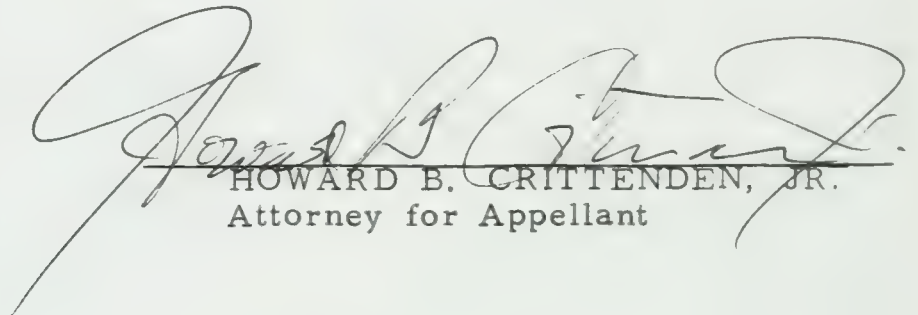
The bound law reports are full of cases where eminent counsel believed the law different and the appellate court got the last guess. No complaint can be made if the Court states the law as it sees it. To avoid stating the material facts and to not mention the points of law raised by them goes to the very right of a litigant to a review on appeal.

This is a very difficult petition to write. The first impression was to roll with the times and save the trouble of a petition. However, counsel's obligation is to present his client's cause to the best of his ability. He would be timerous were he to avoid his duty to this Court and to his client. To avoid this difficult duty would mark counsel with the moral decay so apparent from the lack of security manifested in the turmoil and lawlessness shocking our society.



The facts in the record and the points of law raised by them in this appeal goes to the very essence of our concepts of justice, grievance procedures and collective bargaining agreements. It is important to non-Union shipclerks that they have a Sec. 301 action when their livelihood is involved. It is important that the appellant have the facts in the record fully stated and the law raised by the facts decided.

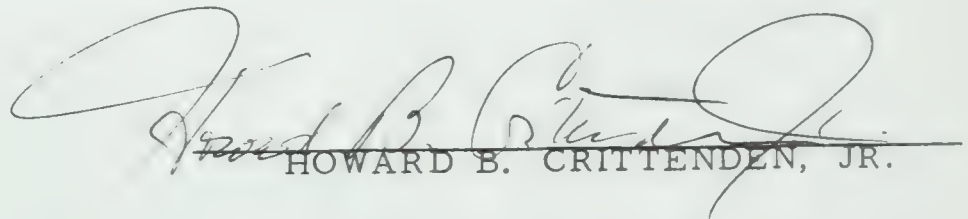
We urge this as a matter of exceptional importance requiring a consideration by the full Court to secure and maintain a uniformity of decisions.



HOWARD B. CRITTENDEN, JR.
Attorney for Appellant

CERTIFICATE OF COUNSEL

I, HOWARD B. CRITTENDEN, JR., do hereby certify that the foregoing petition for rehearing and suggestion under Rule 35 in this cause is presented in good faith and not for the purpose of delay.



HOWARD B. CRITTENDEN, JR.



JUN 11 1969

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES G. RUSSELL,
Appellant,

v.

PAUL H. NITZE, Secretary of the Navy,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF IDAHO

SUPPLEMENTARY MEMORANDUM

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General,

J. F. BATES,
United States Attorney,

CARL EARDLEY,
Deputy Assistant Attorney General,

MORTON HOLLANDER,
ROBERT M. HEIER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

FILED

JUN 9 1969

WM. B. LUCK, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22528

JAMES G. RUSSELL,
Appellant,

v.

PAUL H. NITZE, Secretary of the Navy,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF IDAHO

SUPPLEMENTARY MEMORANDUM

This supplementary memorandum is submitted pursuant to the Court's request, made during oral argument on May 16, 1969. On pages 2 to 8 we have set forth the Navy Regulations in force in 1963, the time of the events in question.

In connection with the Secretary's contention that Russell has not exhausted his administrative remedies^{1/} the Court inquired whether Mr. Russell, at this late date, still may have review before the Board for the Correction of Naval Records. At page 9 of this memorandum we set out the full text of a letter from the Department of the Navy dated May 21, 1969, and stating that "Mr. Russell is now privileged to

1/ See Craycroft v. Ferrall, C. A. 9, Dkt. No. 22,582, decided March 5, 1969.

petition the Board for Correction of Naval Records to review his case."

REGULATIONS INVOLVED

Navy Regulations, amended as of January 23, 1963, and in effect upon the dates in question, provide in relevant part:

32 C.F.R. 730.12 Discharge of enlisted personnel by reason of unfitness.

(a) Enlisted personnel may be separated by reason of unfitness with an undesirable discharge or with a higher type discharge when it is warranted by the particular circumstances in a given case. A discharge by reason of unfitness, regardless of the attendant circumstances, will be effected only when directed by or authorized by the Chief of Naval Personnel. The provisions of this section are not to be used as a substitute for action under the Uniform Code of Military Justice (10 U.S.C. 801-940). Therefore, discharge by reason of unfitness will not be issued in lieu of disciplinary action except upon the determination by the Chief of Naval Personnel that the interests of the service as well as the individual will best be served by administrative discharge. Accordingly, discharge by reason of unfitness normally will not be recommended in lieu of disciplinary action.

(b) An enlisted person may be recommended for discharge by reason of unfitness to free the service of persons whose military record is characterized by one or more of the following:

(1) Frequent involvement of a discreditable nature with civil or military authorities.

(2) Sexual perversion including but not limited to (i) lewd and lascivious acts, (ii) homosexual acts, (iii) sodomy, (iv) indecent exposure, (v) indecent acts with or assault upon a child under age 16, or (vi) other indecent acts or offenses.

(3) Drug addiction or the unauthorized use or possession of habit-forming narcotic drugs or marijuana.

(4) An established pattern for shirking.

(5) An established pattern showing dishonorable failure to pay just debts.

(6) Other good and sufficient reasons, as determined by the Chief of Naval Personnel.

(c) In each case processed in accordance with this section, the individual is subject to an undesirable discharge and therefore the following is required:

(1) The individual must be informed in writing of the reason(s) for which he is being considered for discharge.

(2) The individual must be afforded an opportunity to submit in writing a request for or a waiver of the privileges set forth in § 730.14(c).

(d) Attention is directed to § 730.14 which prescribes the detailed procedure for submission of reports and recommendations for discharge by reason of unfitness.

(e) Enlisted personnel, except those processed under paragraph (b)(2) of this section, shall be retained on board pending receipt of instructions from the Chief of Naval Personnel.

(f) Enlisted personnel serving on board ships, overseas stations, and continental U.S. activities lacking separation facilities who are recommended for discharge in accordance with paragraph (b)(2) of this section may be transferred to the nearest continental U.S. separation activity to await instructions from the Chief of Naval Personnel. The transfer orders and records must accurately reflect the person's status and reason for transfer in order to ensure that the individual is held pending receipt of the instructions from the Chief of Naval Personnel. In this connection, a complete copy of the papers forwarded to the Chief of Naval Personnel shall be filed in the individual's service record.

32 C.F.R. 730.14 Preparation of brief form and other documents required under §§ 730.10, 730.12, and 730.13.

(a) The cases of enlisted personnel under consideration for discharge by reason of unsuitability, unfitness, or misconduct under §§ 730.10, 730.12, or 730.13 respectively shall be prepared as set forth herein. Commanding officers shall ensure that complete and carefully prepared briefs are submitted and that the instructions in this section are scrupulously adhered to.

(b) An enlisted person being considered for a discharge by reason of unsuitability shall be informed as to the circumstances which are the basis for the contemplated action and shall be afforded an opportunity to make a statement in his own behalf.

(c) An enlisted person who is subject to undesirable discharge by reason of unfitness under § 730.12 or by reason of misconduct under § 730.13 shall, if his whereabouts is known, be informed as to the circumstances which are the basis for the contemplated action and afforded an opportunity to request or waive, in writing, any or all of the following privileges:

(1) To have his case heard by a board of not less than three officers.

(2) To appear in person before such board (unless in civil confinement or otherwise unavailable).

(3) To be represented by counsel who, if reasonably available, should be a lawyer.

(4) To submit statements in his own behalf.

If the individual submits a written request to have his case heard by a field board of officers, the commanding officer shall convene an administrative board in accordance with § 730.15. The recorder for the field board shall be furnished with the completed brief of the case (paragraph (g) or (h) of this section), as appropriate, and the service record of the individual concerned.

(d) Those cases processed under § 730.12 or § 730.13 wherein the individual waives or does not request field board action and those cases wherein the individual is processed under § 730.10 shall be forwarded, together with all pertinent papers, direct to the Chief of Naval Personnel to final action.

(e) When discharge under § 730.10 or § 730.12 is contemplated, a brief shall be prepared in the format of Exhibit 1 (see paragraph (g) of this section) in accordance with the following instructions:

(1) Summary of military offenses.
List in chronological order all disciplinary action during current enlistment. Include service record entry page numbers, date of non-judicial punishment or court-martial by type, description of offense(s), non-judicial punishment or sentence as approved and approval data, and all violations of brig or retraining command regulations during current confinement with action taken thereon.

(2) Unclean habits, if any. Substantiate all unclean habits including the occurrence of repeated venereal disease infections during the current enlistment. When reporting venereal diseases, indicate the date of each admission and nature of the infection.

(3) Civil conviction, if any, on the basis of information contained in the service record or otherwise readily available.
List date and court in which convicted, offense, and sentence awarded.

(4) Enclosures. (1) Individual's signed statement in own behalf. If an undesirable discharge is being considered, statement should include, "I have been advised that I may be discharged under other than honorable conditions and the basis therefor. I understand such discharge may deprive me of virtually all veterans' benefits based upon my current period of active service, and that I may expect to encounter substantial prejudice in civilian life in situations wherein the type of service rendered in any branch of the Armed Forces or the character of the discharge received

therefrom may have a bearing. In regard thereto, I desire to make the following statement . . . " If the individual refuses to make or sign a statement, a page 13 service record entry to that effect should be enclosed.

(ii) Copy of page 9 of the service record.

(iii) Individual's signed request for or waiver of privileges outlined in paragraph (c) of this section. (Note that this requirement does not apply to cases processed under § 730.10.)

(iv) Other pertinent documents such as psychiatric or medical evaluation (especially in aberrant sexual behavior cases), police report, etc.

(v) Comment and recommendation of commanding officer and/or his concurrence or nonconcurrence if case is heard by a field board. If the commanding officer contemplates recommending a less favorable disposition than that proposed by the field board or if the pertinent section (§ 730.12 or § 730.13) permits a less favorable disposition than that proposed by the field board, the commanding officer shall inform the individual accordingly and afford him an opportunity to submit such additional statement as he desires in an effort to show cause why a less favorable action should not be finally taken.

(f) When a case is processed under § 730.13, a brief shall be prepared in the format of Exhibit 2 (see paragraph (h) of this section), in accordance with the following instructions:

(1) Circumstances of offense(s) in detail. Include a brief resume of the circumstances surrounding the offense and the pertinent dates.

(2) Action of civil authorities. Include citation of any civil statute(s) violated, charge on which tried and convicted, court in which convicted, and maximum punishment which could have been imposed for such a conviction under the UCMJ (Uniform Code of Military Justice), D.C. Code, or Title 18, U.S. Code as applicable (see § 730.13).

(3) Previous civil convictions, if any, on the basis of information contained in the service record or otherwise readily available. List date and court in which convicted, offense, and sentence awarded.

(4) Summary of military offenses, if any. List in chronological order all disciplinary action during current enlistment. Include service record entry page numbers, date of non-judicial punishment or court-martial by type, description of offense(s), non-judicial punishment or sentence as approved and date of approval, and all violations of brig or retraining command regulations during current confinement with action taken thereon.

(5) Remarks. Include location of individual's records, any unauthorized absence involved, and disciplinary action taken or pending, identification of any other military personnel involved in the case, etc.

(6) Enclosures. (i) Individual's signed statement in own behalf. All such statements should include, "I have been advised that I may be discharged under other than honorable conditions and the basis therefor. I understand such discharge may deprive me of virtually all veterans' benefits based upon my current period of active service, and that I may expect to encounter substantial prejudice in civilian life in situations wherein the type of service rendered in any branch of the Armed Forces or the character of discharge received therefrom may have a bearing. In regard thereto, I desire to make the following statement * * *". If statement cannot be obtained, or if the individual refuses to make or sign a statement, a page 13 service record entry to that effect should be enclosed.

(ii) Statement of witnesses, arrest reports, copies of court records, probation orders, or any other pertinent documents.

(iii) Copy of page 9 of the service record.

(iv) Individual's signed request for or waiver of privileges outlined in paragraph (c) of this section. If such request cannot be obtained, include information relative to the attempt made to get the request.

(v) Comment and recommendation of commanding officer and/or concurrence or non-concurrence if case is heard by a field board. If the commanding officer contemplates recommending a less favorable disposition than that proposed by the field board or if the pertinent section (§ 730.12 or § 730.13) permits a less favorable disposition than that proposed by the field board, the commanding officer shall inform the individual accordingly and afford him an opportunity to submit such additional statement as he desires in an effort to show cause why a less favorable action should not be finally taken.

(g) Exhibit 1: Brief concerning individuals processed under (check one).

LETTER FROM THE DEPARTMENT OF THE NAVY



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
WASHINGTON, D. C. 20370

CEC:mas
21 May 1969

Honorable William D. Ruckelshaus
Assistant Attorney General
Civil Division
Department of Justice
Washington, D. C. 20530

Attention: Mr. Morton Hollander
Chief, Appellate Section

Re: James G. Russell v. Nitze

Dear Sir:

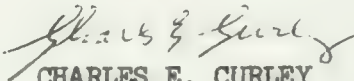
This is in response to your telephonic inquiry requesting information as to the jurisdiction of the Board for Correction of Naval Records to review the case of Mr. James G. Russell, a former member of the naval service.

Department of the Navy records show that Mr. Russell was discharged on 29 July 1963 with an undesirable discharge. Thereafter, pursuant to the provisions of 10 USC 1553, he petitioned the Navy Discharge Review Board to review his case with the view to changing the undesirable discharge, and on 19 September 1966 the Secretary of the Navy approved that Board's decision that the undesirable discharge not be changed.

Mr. Russell is now privileged to petition the Board for Correction of Naval Records to review his case. The law under which the Board operates, 10 USC 1552, and its implementing regulations, provide that the application, DD Form 149, should be filed within three years after discovery of the alleged error or injustice, but a failure to so file may be excused by the Board if it finds it would be in the interest of justice to do so. Mr. Russell may file within three years of the Navy Discharge Review Board's denial, 18 September 1969. In the event he files after that date, he should submit such reasons as he may have for not filing sooner in order that such reasons may be considered by the Board in determining whether or not it should excuse the failure to file within three years.

I am enclosing a copy of the standard form application, DD 149, and a copy of the Board's regulations.

Sincerely yours,


CHARLES E. CURLEY
Executive Secretary

Encls

Respectfully submitted,

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General,

J. F. BATES,
United States Attorney,

CARL EARDLEY,
Deputy Assistant Attorney General,

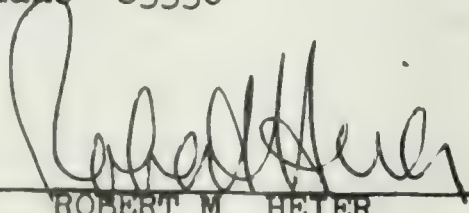
MORTON HOLLANDER,
ROBERT M. HEIER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

JUNE 1969.

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 1969, I served the foregoing Supplementary Memorandum of the appellee Paul H. Nitze, Secretary of the Navy, by mailing three copies, postage prepaid, air mail, to counsel for appellant:

Cecil D. Hobdey, Esquire
James, Hobdey & Shaw
Box 176
Gooding, Idaho 83330



ROBERT M. HEIER
Attorney for Appellee.

See Vol. 3484

FILED

JUN 12 1969

WILLIAM HICKS, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUN 16 1969

JAMES RILEY, JR. and
FRANK MARSHALL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellees.

No. 22511

PETITION FOR REHEARING

COMES NOW the Appellant JAMES RILEY, JR., and pursuant
Rule 40 (a) of the Rules of Appellate Procedure, herewith submits this
petition for Rehearing of the Opinion filed May 28, 1969, in this Court, affirm-
ing his conviction, the subject of the above-entitled Appeal by said Appellant.

The following points are suggested for rehearing:

1. The Court's conclusion that the informer was shown to have
been reliable Appellant submits was not warranted by credible evidence.
2. That the trial Court's failure to require disclosure of the
identity of the informer inhibited Appellant from testing by cross-examination
the extent of the claimed reliability.



3. That the failure to require disclosure of identity was error because Appellant was deprived of any opportunity to question the informer on his part in planting the drugs on either of the Appellants or in some conveyance or sack, etc., of theirs, which drugs later were discovered in the state vehicle.

4. That the Court misunderstood one portion of Appellant's claim of lack of probable cause in that Appellant has argued and raised the point that prior to actual discovery of the drugs in the sack mysteriously in the state vehicle, the apparent tips of the informer had proven unreliable (witness the results of the July 5 search). Thus, there was no serious and substantial probable cause for the arrest of Appellant in the state vehicle, which arrest resulted when he was first taken into technical custody, before discovery of the sack with the drugs.

5. That the Court did not discuss or resolve the issue of abandoned property in connection with the discovery of the sack.

6. That there was no showing by Appellee that Appellant had been in the company of known narcotic dealers; only vague references thereto in the transcript, and certainly no showing that Appellant himself knew that they were such.

7. That the Court over-emphasized the off-hand testimony of the officer that he did not see any drugs in the back seat of the state vehicle



before Riley sat in it. Actually, from the testimony it is apparent that the officer did not make a special point of noticing or searching.

8. That because of the complete lack of bona fide probable cause for the arrest, Appellant RILEY's claimed statement should have been inadmissible, and its occurrence not a portion of this Court's opinion.

9. That there was no showing by Appellee that the life of the informer would have been in jeopardy by requiring disclosure of his identity.

10. That the Court has overlooked the argument of Appellant that the actual discovery of the narcotics at bar was not made until after both Appellants had been out of the vehicle and in the state building for some period of time. Thus, any theory of constructive joint possession is completely discredited as a matter of law because of the lapse during which a third party could have planted the drugs. The record shows that there was not a steady and complete surveillance of the vehicle at all times during this interval.

11. That the Court overlooked the holding of Aguilar vs. Texas, 378 U. S. 108, 84 S. Ct. 1509, discussed in the briefs of Appellants, which requires information of an informant to be based upon personal knowledge of the informer, as applied to the facts of this case.

WHEREFORE, it is respectfully requested that the Court rehear this matter and issue its Order reversing the judgment as to your Appellant.

Dated this 10 day of June, 1969.

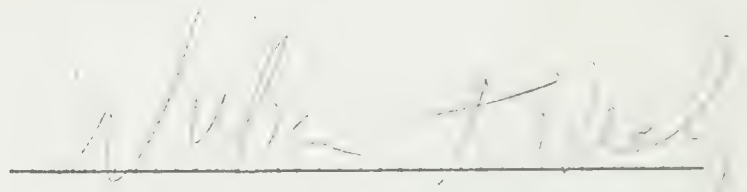
Law Offices of WILLIAM T. HEALY
1009 Tucson Federal Savings Tower
32 North Stone Avenue
Tucson, Arizona



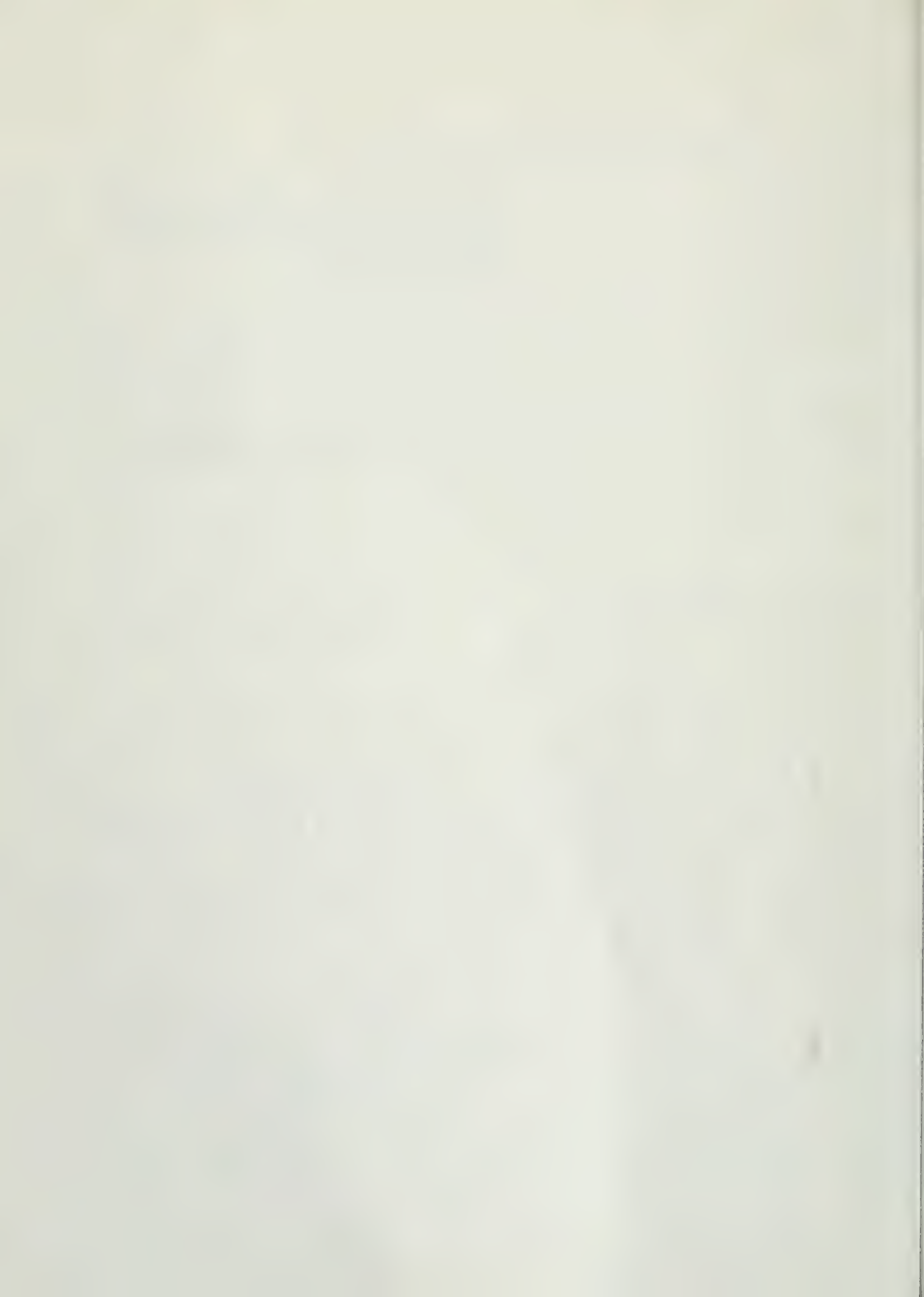
WILLIAM T. HEALY
Attorney for Appellant

STATE OF ARIZONA)		
)	ss.	CERTIFICATE OF SERVICE
COUNTY OF PIMA)		

WILLIAM T. HEALY, being first duly sworn, deposes and says: That he delivered to the office of the United States Attorney at the Federal Building, Tucson, Arizona, three copies of the within Petition for Rehearing and served same upon said United States Attorney on the 10 day of June, 1969.

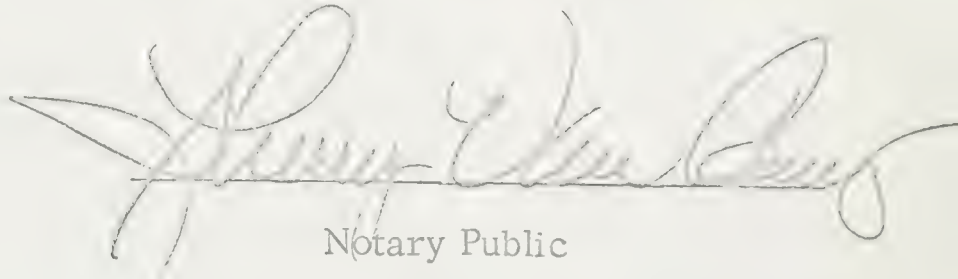


WILLIAM T. HEALY



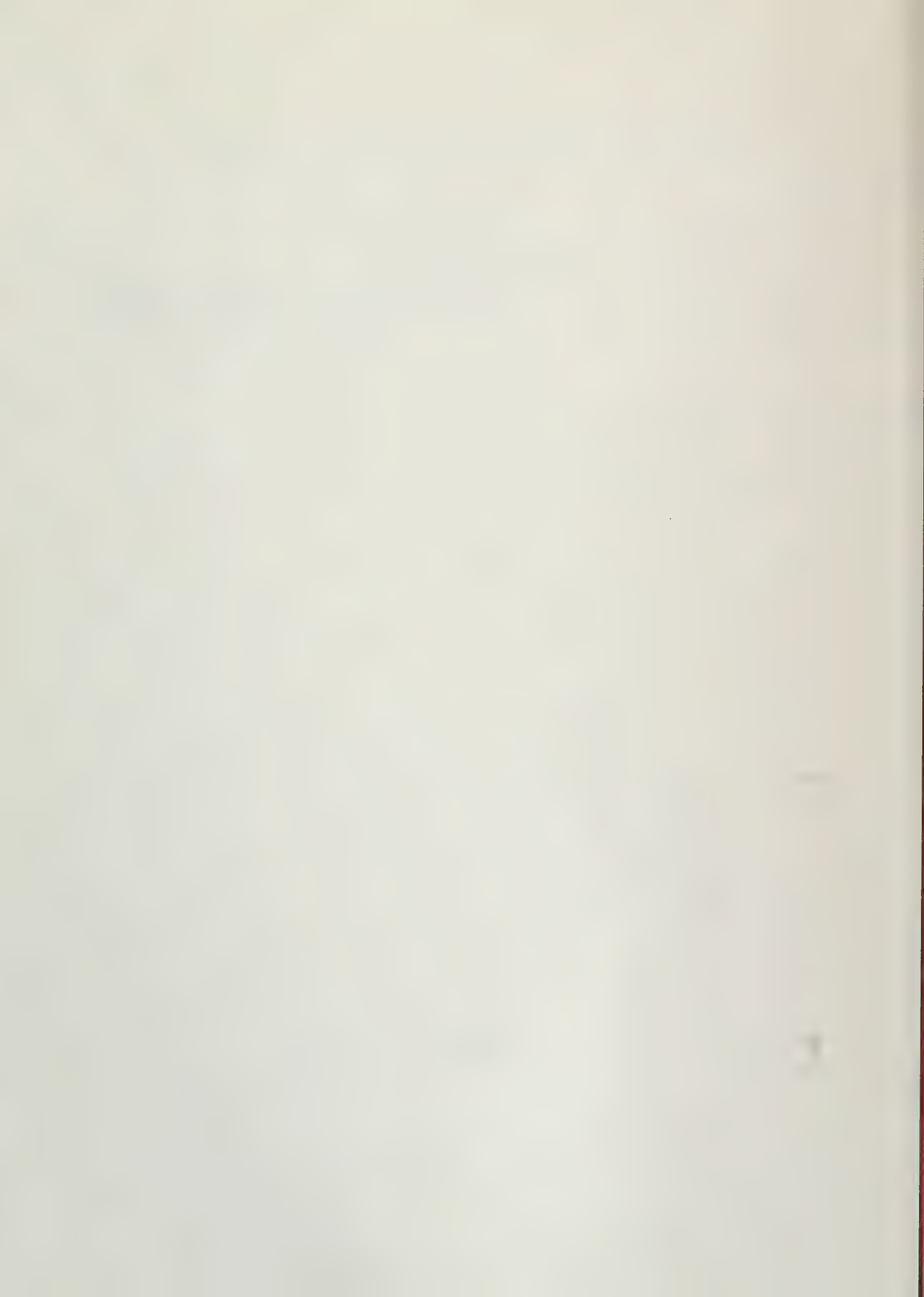
SUBSCRIBED AND SWORN TO before me this 10 day of

June, 1969.


Notary Public

My Commission Expires:

February 1, 1971



IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORVIN E. POWELL, III,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

FILED

JUN 16 1969

APPELLEE'S BRIEF

WM. B. LUCK, CLERK

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.
United States Attorney

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORVIN E. POWELL, III,

Appellant,

vs.

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APPELLEE'S BRIEF

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORVIN E. POWELL, III,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

On May 18, 1966, a six count indictment was returned against the appellant, NORVIN E. POWELL, III, by the Federal Grand Jury for the Southern District of California, Central Division [C. T. 2].^{1/}

The indictment charged Powell with a violation of Federal laws relating to the possession and sale of marihuana.

Powell was found guilty on all six counts by a jury verdict on June 22, 1966 [C. T. 31].

1/ "C. T." refers to Clerk's Transcript of Record.

On July 12, 1966, appellant was sentenced to the custody of the Attorney General for five years on each of the six counts, with the sentences to run concurrently [C. T. 33].

Powell filed a timely Notice of Appeal on July 15, 1966 [C. T. 34]. The jurisdiction of the District Court was predicated on Title 18, United States Code, §3231; Title 21, United States Code, §176(a); and Title 26, United States Code, §4742(a). This Court has jurisdiction under Title 28, United States Code, §§1291 and 1294.

II

STATUTES INVOLVED

Title 21, United States Code, §176(a) provides in pertinent part as follows:

"Whoever, knowingly, with intent to defraud the United States, receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000.

"Whenever on trial for a violation of this subsection, the defendant is shown to have had the

marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury. "

Title 26, United States Code, §4742(a) provides in pertinent part as follows:

"It shall be unlawful for any person . . . to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued for that purpose by the Secretary or his delegate. "

Title 26, United States Code, §7273(b) provides in pertinent part as follows:

"Whoever commits an offense . . . described in . . . §4742(a) shall be imprisoned not less than five years or more than 20 years, and in addition, may be fined not more than \$20,000. "

III

STATEMENT OF THE CASE

Powell was indicted on May 18, 1966 by the Federal Grand Jury for the Southern District of California, Central Division. Counts One and Four of the six-count indictment charged that he

knowingly and unlawfully received, concealed, and facilitated the concealment and transportation of 1,604.1 grams of marihuana on April 11, 1966, and 1,498.25 grams of marihuana on April 27, 1966. Counts Two and Five of the indictment charged that he knowingly and unlawfully sold and facilitated the sale of the aforementioned marihuana on the said dates. Counts Three and Six of the indictment charged that he knowingly and unlawfully sold the aforementioned marihuana on the said dates, without obtaining from the purchaser written orders on forms issued for that purpose by the Secretary of the Treasury [C. T. 2].

Trial by jury was held on June 21 and 22, 1966, before the Honorable William N. Goodwin, United States District Judge, at which time Powell was found guilty on all counts [C. T. 31].

On July 12, 1966, Powell was sentenced to the custody of the Attorney General for five years on each of the six counts, with the sentences on Counts Two, Three, Four, Five and Six to begin and run concurrently with the sentence on Count One [C. T. 33] .

Powell filed a timely notice of appeal on July 15, 1966 [C. T. 34].

STATEMENT OF FACTS

On April 11, 1966, an agent of the Federal Bureau of Narcotics, William Turnbou, went to the residence of Powell with a special employee of the Federal Bureau of Narcotics named Leroy C. Dukes, alias Abdula. Powell was not home when Agent Turnbou and Dukes arrived at the residence, but he appeared about 30 minutes later. Dukes introduced Agent Turnbou to Powell as the person who wanted marihuana. Agent Turnbou asked Powell if he could get anything other than marihuana. Powell responded that he could get heroin, but payment would have to be in advance of delivery. He also told Agent Turnbou that he could obtain marihuana for \$50 a kilogram if the money was paid in advance to the "connection", who went to Mexico to get the marihuana [R. T. 13-15, 190, 29]. ^{2/}

While at Powell's residence, Agent Turnbou told him he wanted to buy two kilograms of marihuana. Powell said the price would be \$135 per kilogram. Agent Turnbou would not advance the money to him. Powell then left the residence, taking his bass fiddle, and returned with two packages of marihuana which he gave to Agent Turnbou who, in turn, gave Powell \$270. The two of them then conversed about future transactions for the

^{2/} "R. T." refers to Reporter's Transcript of Record.

purchase of marihuana and heroin by Agent Turnbou. Thereafter, Agent Turnbou and Dukes left Powell's residence [R. T. 15-16].

On Apeil 22, 1966, Agent Turnbou and Dukes met with Powell at his residence. Agent Turnbou and Powell had a discussion about the purchase of marihuana. Powell said he could not do business on that date, but would be able to in about a week [R. T. 17, 35].

At approximately 10:30 P.M. on April 27, 1966, Agent Turnbou and Dukes went to Powell's residence. Agent Turnbou told Powell he wanted two more kilograms of marihuana. Powell said he would have it shortly. He left his residence and returned about 10 minutes later with two packages of marihuana. Agent Turnbou then paid Powell \$270. On the occasion of this transaction, Agent Turnbou observed Powell smoking what he (Powell) said was a marihuana cigar [R. T. 17-18, 37, 45].

Powell did not obtain from Agent Turnbou a Treasury order form at the time of either of the sales of marihuana [R. T. 20].

Dukes met Powell in 1965 at a club known as "Mother Neptune's." Powell and Dukes both played the bass fiddle at the club. Dukes would go to the club almost every night and would usually see and talk to Powell. Dukes went to Powell's residence several times in late 1965. On those occasions, he and Powell would talk about music and narcotics [R. T. 56-59].

In February 1966, while Powell and Dukes were at the club, Powell told Dukes he could sell any amount of narcotics.

After Dukes learned that Powell was selling narcotics, and after he talked to agents of the Federal Bureau of Narcotics, he asked Powell for a "connection" for narcotics [R. T. 61-62, 72].

In March 1966, Dukes went to Powell's residence several times. On one occasion, Powell told Dukes he was still prepared to sell narcotics and had "connections" if Dukes wanted "anything in any amount". Dukes told Powell he was not interested in buying narcotics [R. T. 71-72].

During March and April 1966, Powell was continually telling Dukes he had narcotics to sell. In early April 1966, Dukes called Powell. Powell told him he still had narcotics to sell and practically forced Dukes to buy narcotics [R. T. 78-79].

In March 1966, Dukes told Powell he had someone who was interested in buying narcotics. Powell said "Okay, you get that party, and when you get them, make sure that they're all right" [R. T. 81-82],

Four or five nights after Powell's first sale of marihuana to Agent Turnbou on April 11, 1966, Dukes talked to Powell at "Mother Neptune's". Powell said he was satisfied with what had happened the night of the first sale to Agent Turnbou and talked about a future transaction. Powell said he was ready to make another sale whenever Dukes was ready. Dukes conveyed this information to Agent Turnbou who decided to wait about one and a half weeks before another transaction [R. T. 99-100].

Dukes never used narcotics nor supplied narcotics to anyone [R. T. 55, 59]. He began cooperating with the Federal

Bureau of Narcotics in November 1965, in the belief that he would be given consideration with respect to a charge then pending against him. Dukes was not promised anything for his cooperation [R. T. 75].

Powell testified he met Dukes in August 1965 and did not see him again until January 1966 at "Mother Neptune's".

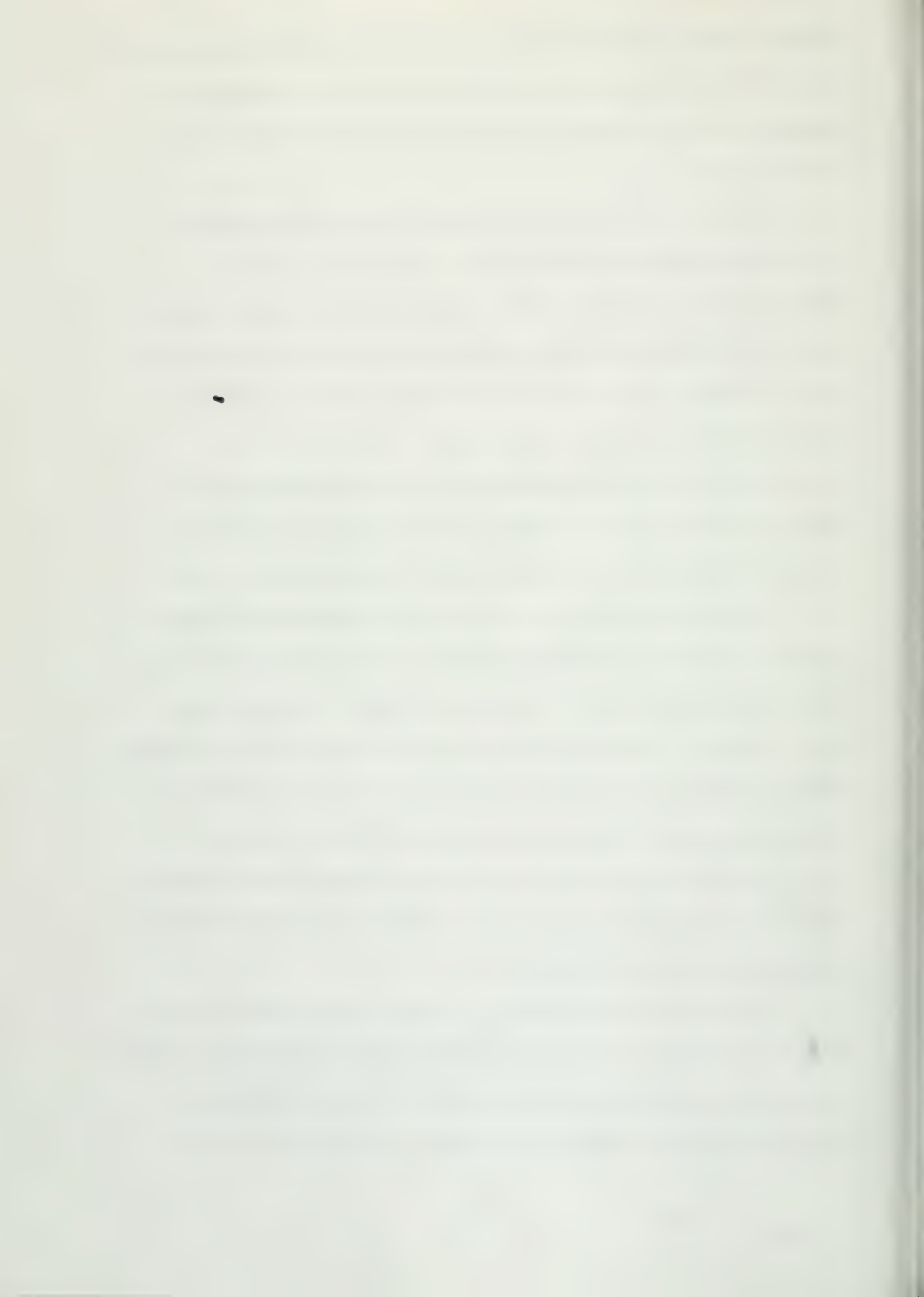
Powell saw Dukes about a dozen times in January 1966. Powell had an initial discussion about narcotics with Dukes in February 1966, in Dukes' car, at which time Dukes sniffed cocaine and offered to sell cocaine to Powell [R. T. 106-110].

Powell testified that Dukes tried to sell narcotics to someone in the club in late March 1966. Several times Powell cautioned Dukes about to whom he sold narcotics [R. T. 114].

Powell did not deny the two sales of marihuana to Agent Turnbou on April 11, 1966 and April 27, 1966, but said that he was acting as the "front" for Dukes at Dukes' strong urging [R. T. 116-117, 127-128, 132-135, 142-143, 158]. Powell denied being a supplier of marihuana and denied trying to get Dukes to buy narcotics from him since February 1966 [R. T. 149].

Powell admitted that he told Agent Turnbou that he could supply any amount of narcotics, but claimed he only said that at the request of Dukes [R. T. 150].

Powell admitted that he told Agent Turnbou that he could obtain marihuana for \$50 per kilogram if the money was received by the "connection" in advance to take with him to Mexico, but he claimed he only said that at the request of someone he did



not name [R. T. 185].

Powell admitted marihuana convictions in 1960 and 1961 or 1962 [R. T. 150-151].

V

ARGUMENT

A. THE TRIAL COURT JUDGE MAY PROPERLY COMMENT TO THE JURY ON THE CREDIBILITY OF WITNESSES.

Powell contends that the trial court judge's comment to the jury concerning the credibility of Reynaldo Navarro, a witness for Powell, was prejudicial error. Navarro testified that he had obtained marihuana from Dukes in January 1966, but admitted he had told a different story when he was prosecuted in the State court for possession of the marihuana. Navarro admitted that he had talked to Powell in jail prior to testifying in this case [R. T. 120-125]. The trial court judge told the jury it was his opinion that Navarro's testimony was not worthy of belief. However, prior to such comment, the judge instructed the jury that any comments he made were only expressions of his own opinion as to the facts, and the jury could disregard them entirely, since the jurors were the sole judges of the facts [R. T. 205]. Later, the trial court judge repeated his admonition to the jury that they were the sole judges of the facts and of the credibility of the witnesses who had testified in the case [R. T. 209].

No objection was made by Powell to the judge's comments
[R. T. 224].

The United States Supreme Court and this Court have repeatedly upheld the right of a trial court judge to comment on the credibility of witnesses, provided the comment is fair and the jury is clearly instructed that they are the sole judges of the facts and may disregard such comments.

United States v. Murdock, 290 U.S. 389, 394 (1933);

Fletcher v. United States, 313 F.2d 137, 138-140

(9th Cir. 1963), cert. denied, 374 U.S.

812 (1963);

Smith v. United States, 305 F.2d 197, 205

(9th Cir. 1962), cert. denied, Corey v.

United States, 371 U.S. 890 (1962);

Henry v. United States, 186 F.2d 521

(9th Cir. 1951).

See also:

Honce v. United States, 299 F.2d 389, 398-401

(8th Cir. 1962).

B. THE TRIAL COURT JUDGE MAY PROPERLY
ASK QUESTIONS OF WITNESSES.

Powell testified on cross-examination that he got the telephone number of a source of supply for marihuana from Dukes, that he memorized the number, and called the number for Dukes on April 11, 1966. At the time of trial, he indicated he could remember four digits of the number, and the trial court judge asked him to give the first two digits of the number [R. T. 173]. No objection to the question was made by Powell's counsel. Powell contends that the judge's question constitutes prejudicial error.

This Court has explicitly upheld the right of a trial court judge to interrogate witnesses.

"It is within the province of a federal trial judge to interrogate witnesses and also to comment on their testimony if he so desires."

Fletcher v. United States, supra, at 139.

As stated in Smith v. United States, supra, at 205:

"A federal trial judge, . . . is more than a moderator or umpire. He has the responsibility to preside in such a way as to promote a fair and expeditious development of the facts unencumbered by irrelevancies. He may assist the jury by commenting upon the evidence and this may include an appraisal of

the credibility of witnesses providing the comment is fair and the jury is clearly instructed that they are to find the facts and may disregard such comments. "

As previously noted, Powell did not make an objection to either the trial court judge's interrogation or comments to the jury. The United States Supreme Court and this Court have repeatedly held that they will not consider claims of error in the trial raised for the first time on appeal, unless there is a showing of manifest injustice.

Johnson v. United States, 318 U.S. 189, 200 (1943);

Eason v. Dickson, 390 F.2d 585, 589

(9th Cir. 1968);

Collozo v. United States, 370 F.2d 316, 317

(9th Cir. 1966);

Gilbert v. United States, 307 F.2d 322, 325

(9th Cir. 1962);

Hebets v. Scott, 152 F.2d 739 (9th Cir. 1945).

See also:

Whaley v. United States, 394 F.2d 399, 400

(10th Cir. 1968).

Powell has made no showing of manifest injustice by the trial court judge's actions.

C. ALLOWING MARIHUANA ADMITTED INTO
EVIDENCE TO GO TO JURY ROOM DOES
NOT CONSTITUTE PREJUDICIAL ERROR

After the trial court judge finished instructing the jury, he asked counsel for both parties whether there was any objection to sending the exhibits to the jury room for use in the jury's deliberation. (The marihuana packages were the only exhibits in the case that were admitted into evidence [R. T. 21]). There was no objection by either side [R. T. 223-224]. Therefore, this issue is not properly raised on appeal (See supporting argument in Paragraph B, hereinabove).

Even assuming for purposes of argument, that a proper objection had been made by Powell, the marihuana was properly allowed to go to the jury room. This Court has held that the sending of exhibits to the jury room is a matter entirely within the discretion of the trial court judge.

Shayne v. United States, 255 F.2d 739 (9th Cir.

1958), cert. denied, 358 U.S. 823 (1958).

See also:

Wall v. United States, 384 F.2d 758 (10th Cir. 1967).

Furthermore, the jurors are instructed that they must weigh and consider all the evidence in arriving at their verdict [R. T. 207]. Since the marihuana in question was part of the evidence, it was proper that it be considered by the jury in its deliberations.

The Karn and Kaplan cases, cited by Powell, are not in point. Karn concerns exhibits that were introduced on a count of

the indictment that was dismissed before the conclusion of the trial, but which exhibits were sent to the jury room during deliberations on a second count of the indictment. Therefore, the jury was considering exhibits that were not even admitted into evidence. The Kaplan case does not even concern the issue of evidence going to the jury.

**D. THE TRIAL COURT DID NOT ABUSE ITS
DISCRETION IN DENYING POWELL'S
MOTION FOR A CONTINUANCE OF THE TRIAL.**

On May 31, 1966, Powell appeared in court for arraignment and plea to the indictment. The court appointed attorney Louis Licht as counsel for Powell. Powell entered a plea of not guilty to all counts, and trial was set for June 20, 1966, at 9:30 A. M. [C. T. 9].

On June 20, 1966, Powell appeared for trial with attorney Sam Bubrick, who had been retained by him. The trial was continued to the following day at 9:30 A. M. [C. T. 10]. On June 21, 1966, Powell made a motion for a continuance before United States District Judge Francis C. Whelan, which motion was denied. United States District Judge William N. Goodwin was assigned the trial of the case. Powell renewed his motion before Judge Goodwin on the same day and the motion was again denied. In support of said motion, Mr. Bubrick alleged that he had just come into the case and was informed by Powell that witnesses Powell wished to call in his defense were in Mexico City. No

showing was made to the court as to the names of the witnesses, their anticipated testimony, or whether they were subject to the subpoena power of the court. Nor was there a showing as to what prejudice would result to Powell if the continuance was not granted [See Supplemental Transcript of Record filed with this Court on January 15, 1969].

In view of Powell's testimony at trial that he sold the marihuana in question, but only as a "front" for Dukes, it is clear that no prejudice to Powell resulted from the denial of the continuance.

In Evalt v. United States, 382 F.2d 424 (9th Cir. 1967), at page 427, this Court said:

"The granting of a continuance to procure an absent witness rests in the sound discretion of the trial court and will not be reviewed on appeal in the absence of a clear showing of abuse."

See also:

Morgan v. United States, 380 F.2d 686

(9th Cir. 1967);

Miller v. United States, 351 F.2d 598 (9th Cir.

1965), cert. denied, 382 U.S. 1027 (1965);

Lemons v. United States, 337 F.2d 619

(9th Cir. 1964).

E. THE USE OF INFORMANTS BY FEDERAL NARCOTICS AGENT TO APPREHEND VIOLATORS OF NARCOTICS LAW IS PERMISSIBLE.

At the time Dukes introduced Agent Turnbou to Powell, he had a narcotics charge pending against him and had agreed to cooperate with the Federal Bureau of Narcotics. Powell contends that the Government's use of Dukes to obtain evidence against Powell is not permissible. As authority, he cites Williamson v. United States, 311 F.2d 441 (5th Cir. 1962). Williamson did not hold that an informer cannot be utilized, but rather critized an arrangement between Government agents and an informer whereby the informer was paid a specified amount for obtaining evidence against specified persons (See p. 444). The facts of the instant case are clearly distinguishable.

In the instant case, Dukes was not working for the Government pursuant to any fee arrangement. Dukes himself maintained that no promises were made to him by the Government in exchange for his cooperation. He stated that he agreed to cooperate with the Government after talking to his attorney and in the belief that he would get consideration in the charges pending against him for his cooperation [R. T. 75].

The United States Supreme Court and this Court have many times upheld the use of informers by the Government in the apprehension of narcotics law violators.

Masciole v. United States, 356 U.S. 386 (1958);

Sherman v. United States, 356 U.S. 369 (1958);

Sorrells v. United States, 287 U.S. 435, 551 (1932);

Gonzales v. United States, 251 F.2d 298

(9th Cir. 1958);

Trice v. United States, 211 F.2d 513, 516 (9th

Cir. 1954), cert. denied, 348 U.S. 900 (1954).

This court stated in Trice, supra, at 516:

"So great is the menace [the use of narcotics] that the hiring of disreputable persons to act with the narcotics agents in deceit and by despicable methods to catch distributors of [narcotics] has been sanctioned by the highest courts as the only successful manner to combat the evil."

Parenthetically, it must be noted that the objection to use of evidence obtained with the help of an informant should have been raised by a motion to suppress. Since no such motion was made by Powell, the issue is not properly raised on appeal.

Kuhl v. United States, 370 F.2d 20, 21

(9th Cir. 1966).

F. THE INSTRUCTION TO THE JURY OF §4744(a) OF TITLE 26, UNITED STATES CODE, DOES NOT CONSTITUTE REVERSIBLE ERROR.

Powell was not charged with violating 26 United States Code, §4744(a). However, for a reason that does not appear in

the record, the trial court judge read said section to the jury in his instructions. There was no objection to the instructions [R. T. 224]. The law is abundantly clear that where no objection is made to an instruction at trial, the party failing to object cannot complain on appeal about the instruction given.

Singer v. United States, 380 U.S. 24, 38 (1965);

White v. United States, 394 F.2d 49, 55-56

(9th Cir. 1968);

Cooper v. United States, 282 F.2d 527

(9th Cir. 1960).

Since Powell was not charged with a violation of Title 26, United States Code, §4744(a), no prejudice to him resulted from the reading of said section to the jury.

The trial court judge correctly instructed the jury as to the two essential elements needed to prove the offense of Title 26, United States Code, §4742(a) [R. T. 216]. The record is clear that Powell did not obtain any required order form from Agent Turnbou at the time of the two sales of marihuana [R. T. 20].

G. IT IS NOT NECESSARY TO CONSIDER THE
VALIDITY OF POWELL'S CONVICTIONS ON
COUNTS ONE, TWO, FOUR AND FIVE OF
THE INDICTMENT.

Where a defendant is sentenced to the same period of incarceration for convictions on more than one count of an indictment and the sentences are to run concurrently, the fact that defendant was validly convicted on any one count precludes

reversal regardless of the validity of the convictions on the other counts.

Lawn v. United States, 355 U.S. 339, 359 (1958);

Hirabayashi v. United States, 320 U.S. 81, 85 (1943);

Blunt v. United States, 404 F.2d 1283, 1289

(D. C. Cir. 1968);

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(9th Cir. 1963);

Noah v. United States, 304 F.2d 317, 318

(9th Cir. 1962);

Russell v. United States, 288 F.2d 520, 521-522

(9th Cir. 1961).

The appellee is aware of the recent decision of the United States Supreme Court in Leary v. United States, ___ U.S. ___ (1969), as it affects the presumptions contained in Title 21, United States Code, §176(a).

However, in the instant case, Powell was sentenced to the custody of the Attorney General for five years on each of the six counts of the indictment, with the sentence on all counts to commence and run concurrently [C. T. 33]. Since the convictions on counts Three and Six, which charged violations of Title 26, United States Code, §4742(a), are valid and not subject to attack on appeal, consideration of the validity of the convictions on Counts One, Two, Four and Five is not necessary.

CONCLUSION

For the foregoing reasons, appellant's conviction should be affirmed.

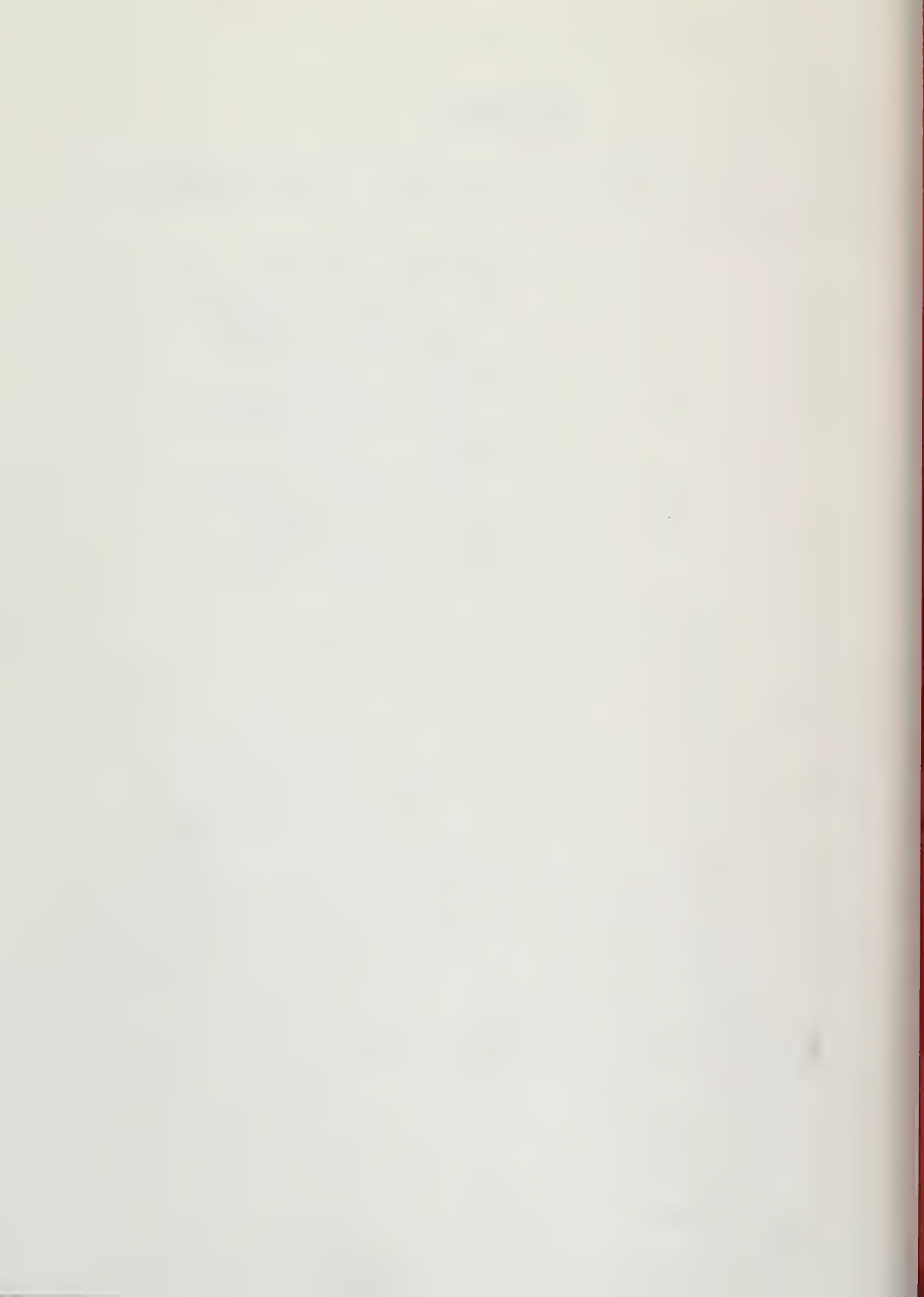
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DON WADE,

JUN 24 1969

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED

JUN 20 1969

APPELLEE'S BRIEF WM. B. LUCK, CLERK

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DON WADE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF PLEADINGS AND FACTS

DISCLOSING JURISDICTION

On December 21, 1966, the Federal Grand Jury for the Central District of California returned a one-count indictment charging Don Wade (hereinafter referred to as "defendant") with violating Title 18, United States Code, §2113 (a) and §2113 (d) [T. R., p. 2]. ^{1/} The indictment charged as follows:

On or about November 23, 1966, in Los Angeles County, within the Central District of California,

1/ "T. R. " refers to Transmitted Record herein.

defendant Don Wade, by force and violence and by intimidation, knowingly and willfully took from Susan P. Blom and Lela Kinsey, \$2,841.20, belonging to, and in the care, custody, control, management and possession of Century Bank, 2028 Westwood Blvd., West Los Angeles, a member bank of the Federal Reserve System and a bank whose accounts were insured by the Federal Deposit Insurance Corporation.

In committing the offense heretofore charged, defendant Don Wade assaulted and put in jeopardy the lives of Susan P. Blom and Lela Kinsey by the use of a revolver, a dangerous weapon and device.

On October 13, 1967, after a trial by jury, the defendant was found and adjudged guilty as charged of violating Title 18, United States Code, §§2113 (a) and 2113 (d) [T. R., pp. 46, 47]. On October 20, 1967, the defendant filed a timely Notice of Appeal [T. R., p. 48].

Jurisdiction of the District Court was based on Title 18, United States Code, §3231 and Title 18, United States §§2113 (a) and 2113 (d). Jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit is based on Title 28, United States Code, §§1291 and 1294.

II

STATUTES AND RULES INVOLVED

Title 18, United States Code, §§2113 (a) and 2113 (d) provide, in pertinent part, as follows:

" (a) Whoever, by force and violence, or by intimidation, takes . . . from the person or presence of another any . . . money . . . belonging to, or in the care, custody, control, management, or possession of, any bank . . . [s]hall be fined not more than \$5,000 or imprisoned not more than twenty years, or both . . .

(d) Whoever, in committing . . . any offense defined in subsection[s] (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of any dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than twenty-five years, or both. "

Title 18, United States Code, §4244 provides as follows:

"Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally

incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused

shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury. "

Federal Rule of Criminal Procedure 28 provides, in pertinent part, as follows:

" . . . The Court may appoint any expert witnesses of its own selection . . . A witness so appointed shall advise the parties of his findings, if any, and may be thereafter called to testify by the court or by any party. He shall be subject to cross-examination by each party . . . "

III

A. DID THE TRIAL COURT ERR BY
CONDITIONING DEFENDANT'S RAISING THE DEFENSE
OF INSANITY UPON HIS FIRST SUBMITTING TO A
MENTAL EXAMINATION BY A COURT-APPOINTED
PSYCHIATRIST AND HIS AFFORDING SAID PSYCHI-
ATRIST SUCH COOPERATION AND INFORMATION
AS MAY BE REQUIRED IN PROPERLY CONDUCTING
THE MENTAL EXAMINATION?

B. DID THE TRIAL COURT ERR BY
INSTRUCTING THE JURY ON THE DEFENSE OF
INSANITY IN THE TERMS OF THE INSANITY TEST
PRESENTLY APPROVED BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT,
NAMELY, THAT INSTRUCTION CONTAINED IN
MATHES AND DEVITT, FEDERAL JURY PRACTICE
AND INSTRUCTIONS, §10.14.

IV

STATEMENT OF FACTS

A. PRE-TRIAL

1. On December 27, 1966, defendant made a motion
for an appointment of a psychiatrist. Said motion was granted,
but subsequently defendant moved for and was granted an order
vacating the appointment of said psychiatrist [T. R. p., 3].

2. On January 5, 1967, the defendant moved for and was granted an order directing the U. S. Marshal to deliver the defendant to his private psychiatrist. Contemporaneous with said order, the trial court granted the Government's motion for the appointment of a psychiatrist for the purpose of reporting to the court whether: (1) the defendant was sane; (2) the defendant was then able to understand the proceedings against him; (3) the defendant was able to assist in his own defense; (4) the defendant's probable prognosis with respect to the above questions; and (5) whether the defendant was legally insane at the time of the commission of the offense [T. R., pp. 4-6].

3. On the advice of his counsel, defendant refused to cooperate with the court-appointed psychiatrist with respect to an examination as to whether or not he was legally insane at the time of the offense [T. R., pp. 13, 18-19].

4. The trial court, on January 23, 1967, found the defendant sane and able to understand the proceedings against him [T. R. p. 8].

5. On January 30, 1967, defendant moved the trial court for an order vacating that portion of the Order Appointing Psychiatrist of January 5, 1967, which pertained to an examination of whether defendant was legally insane at the time of the offense and requiring him to cooperate and afford such information as may be required in properly conducting such a mental examination [T. R., p. 17].

6. On February 28, 1967, the trial court denied

defendant's motion [Memorandum Opinion, T.R. pp. 13-16].

7. On March 2, 1967, the trial court ordered that defendant would be precluded from offering any evidence on the defense of insanity unless he "afford such cooperation and information to the court-appointed psychiatrist as may be required in properly conducting such examination . . ." [T.R., p. 22].

8. On June 8, 1967, the trial court ordered the appointment of two additional psychiatrists, Drs. Karl Von Hagen and Seymour Pollack, to examine the defendant and report to the trial court with respect to, among other things, the question of whether defendant was legally insane at the time of the offense [T.R., pp. 26-29].

9. On August 16, 1967, the trial court ordered the appointment of psychologist Leonard B. Olinger as an examining psychologist in the case [T.R., p. 33].

B. TRIAL

1. At approximately 10:45 A.M., on November 23, 1969, the defendant appeared in the Century Bank, and shouted, "This is a stickup. Everybody get to the back of the bank." [R. T., pp. 70, 72, 81, 86]. ^{2/}

2. Defendant pointed a gun at teller Susan Blom and kept saying, "Don't look at me. Don't look at me. . . . Fill." [R. T., p. 71].

^{2/} "R. T." refers to Reporter's Transcript herein.

3. It was stipulated that the Century Bank was a member of the Federal Reserve System, and a bank the deposits of which were insured by the Federal Deposit Insurance Corporation [R. T., p. 79]. Loss to the bank was stipulated to be \$2,841.20 [R. T., p. 79].

4. At the time of the robbery the defendant wore a bandage or tape on his right cheek [R. T., p. 91]; wore a dark hat, dark suit, a tie and sunglasses [R. T., p. 94]; and made his getaway in a red Austin-Healey convertible [R. T., p. 95], which was stolen on November 23, 1966 [R. T., pp. 97-98].

5. Defendant confessed to committing the bank robbery [R. T., pp. 102-103], after being arrested immediately after the robbery [R. T., pp. 108-115] and subsequently admitted using the tape to hide a blemish [R. T., p. 132].

6. Defendant testified that on the day prior to the bank robbery that he approached the bank with a revolver in his belt, had the impulse to rob the bank, but was able to control it [R. T., pp. 285-286].

7. Defendant further testified that on the day of the robbery he stole a red Austin-Healey [R. T., pp. 288-291], but could remember only a few details after stealing the vehicle [R. T., pp. 291-308].

8. Dr. Hacker, called as a witness for the defense, testified that, at the time of the offense, the defendant was suffering from an emotional disorder; that the defendant probably had periods in which he was not totally aware of what he was

doing; and that there were periods in which the defendant could not conform his conduct to the thoughts he possessed [R. T.,p. 319].

9. Dr. Cohn, also called as a defense witness, testified that on the date of the offense, the defendant was not able to distinguish between right and wrong and that he was not able to understand the nature of his act [R. T., p. 357]; that the defendant was suffering from a psychotic depression [R. T., p. 358]; and that he lacked the substantial capacity to conform his conduct to the requirements of the law [R. T., p. 359, 369].

10. Defendant made a motion to exclude the testimony of any court-appointed psychiatrist based on the privilege of self-incrimination and said motion was denied by the trial court [R. T., p. 414].

11. Dr. Olinger, a psychologist called as a witness for the Government, testified that on the date of the offense the defendant knew the difference between right and wrong; that he knew the nature and quality of his acts [R. T., p. 421]; and that his testing showed no evidence of psychosis or brain damage [R. T., p. 422].

12. Dr. Pollack, called as a Government witness, testified that the defendant was sane at the time of the commission of the offense [R. T., p. 475]; that he was capable of differentiating between right and wrong; that he was aware of the nature and quality of his acts [R. T., p. 476]; that he was capable of exercising his will, power or volition; that he did not have a mental disease or defect [R. T., p. 477]; and that he was capable of

conforming his conduct to the law [R. T., p. 478].

13. Dr. Von Hagen, also called to testify by the Government, testified that on the date of the commission of the offense, that the defendant was sane; that his actions were not beyond his control; that he did not have any mental disease [R. T., p. 527]; and that he was able to conform his conduct to the requirements of the law [R. T., p. 528].

14. Mr. Barron, a Lieutenant employed by the Los Angeles Police Department, testified as to the oral confession made by the defendant on the day of the robbery [R. T., pp. 558-9].

ARGUMENT

- A. THE TRIAL COURT DID NOT VIOLATE DEFENDANT'S CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION BY CONDITIONING DEFENDANT'S RAISING THE DEFENSE OF INSANITY UPON HIS FIRST SUBMITTING TO A MENTAL EXAMINATION BY A COURT-APPOINTED PSYCHIATRIST AND HIS AFFORDING SAID PSYCHIATRIST SUCH COOPERATION AND INFORMATION AS MAY BE REQUIRED IN PROPERLY CONDUCTING THE MENTAL EXAMINATION.
-

1. The Constitutional Privilege Against Self-Incrimination Does Not Extend To Protect An Accused From Being Examined By A Court-Appointed Psychiatrist As To Whether Or Not The Accused Was Legally Insane At The Time Of The Commission Of The Offense Charged If There Is Reasonable Cause To Believe That Such An Issue Will Be Raised At Trial.
-

(a) The trial court properly exercised its "inherent power" to order defendant's examination by a court-appointed psychiatrist as to the question of whether or not the defendant was legally insane at the time of the commission of the offense charged.

Title 18, United States Code, §4244, supra, explicitly provides for the duties and conditions under which a motion for a psychiatric examination may be made. Although §4244 does not contain an express provision for a court-appointed psychiatrist to examine an accused as to his mental condition at the time of the commission of the offense, it cannot reasonably be concluded,

therefore, that no such power exists in the trial court. 3/ On the contrary, it has been held that a federal district court has the inherent power to require a psychiatric examination of an accused as to the issue of insanity at the time of the offense where such issue is raised at trial by the defendant. United States v. Albright, 388 F.2d 719 (4th Cir. 1968); see also Alexander v. United States, 380 F.2d 33 (8th Cir. 1967); Pope v. United States, 372 F.2d 710 (8th Cir. 1967), vacated on other grounds, 392 U.S.

651 (1968); Winn v. United States, 270 F.2d 326 (D. C. Cir. 1959). Although in United States v. Albright, supra, the issue of defendant's mental condition at the time offense was not clearly raised until the day trial began, the court in Albright relied upon Winn v. United States, supra, to support its holding. The appellate court in Winn was concerned with the trial court's denial of the government's pre-trial motion for a . . . "complete and thorough mental examination . . ." Winn v. United States, supra, at 327. The trial court in Winn granted an order limiting the examination solely to the issue of the defendant's mental competency to stand trial. The appellate court, in reversing the conviction, stated at 327 and 328 as follows:

3/ See Federal Rule of Criminal Procedure 28 which provides, in pertinent part, as follows:

" . . . The court may appoint any expert witnesses . . . of its own selection . . . A witness so appointed shall advise the parties of his findings, if any, and may thereafter be called to testify by the court or by any party. He shall be subject to cross-examination by each party . . ."

" . . . the prosecutor who knows that the accused's mental state at the time of the crime will be the critical issue at the trial . . . has an obligation to see to it that any pre-trial mental examination of the accused that may be ordered be broad enough to cast light on that issue . . .

"It is true that D. C. Code §24-301 (Supp. VII, 1959) provides only for an examination limited to trial competency. But nothing in that statute or anywhere else in the law prevents the court, in a case where it is obvious that the trial will revolve about the issue of the accused's mental state at the time of the crime, from ordering such examinations as will produce the evidence required to determine that issue . . ." ^{4/}

It is asserted at page 16 of Appellant's Opening Brief that:

" . . . the prosecution is not empty handed. It may present evidence of the defendant's behavior before, during and after the alleged crime; it may question the expert witness for the offense as to the basis of any opinion he presents and ask an expert for the prosecution to present his own opinion based on

^{4/} See also Mitchell v. United States, 316 F.2d 354, 360 (D. C. Cir. 1963), wherein the Court interpreted D. C. CODE ANN. §24-301 to include the purpose of obtaining evidence on whether the jury should be instructed on the issue of insanity.

those facts and others that may have been introduced in evidence, as well as his observation of the defendant in the courtroom and during any examination made to determine the defendant's ability to stand trial "

This argument was best met and refuted in Alexander v. United States, supra, wherein that Court stated as follows at page 39:

"It would violate judicial common sense to permit a defendant to invoke the defense of insanity and foreclose the Government from the benefit of a mental examination to meet this issue

. . . . To place the burden of proof on this issue on the Government and at the same time to deprive the Government of an opportunity for a mental examination of the defendant would lead to an absurdity and would be a travesty on justice "

[citation omitted].

It is submitted that the ever-important search for the truth, bearing in mind the protection of both individual and society, is not a quest to be borne by the accused alone. The Government, in order to best perform its duty of protecting its citizens, must be allowed to share in that search for the truth, as long as the methods employed in such search remain within the dictates of

the United States Constitution.

It should be noted in this connection that valid distinctions exist between a court-appointed psychiatric examination and any other context in which an accused is compelled to cooperate by divulging information. ^{5/} Said distinction arising from the nature of the trial in which insanity is raised as a defense, are that (1) such a defense is raised by an accused; (2) if the defense is raised, however, the Government must bear the ultimate burden of proof beyond a reasonable doubt; and (3) that the information essential in carrying that burden of proof can only be obtained, in most cases, from the accused himself. ^{6/} With these distinctions in mind, the court in Pope v. United States, supra, clearly rejected a constitutional attack on a court-ordered psychiatric examination and stated at page 720 as follows:

"Certainly, the criminal trial is still a search for truth subject, of course, to constitutional guaranties. It would be a strange situation indeed, if first, the government is to be compelled to afford the defense ample psychiatric service and evidence at government expense and, second, if the government is to have the burden of proof, as it does with the competency issue in the case, Davis

^{5/} Karsh, "The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia" 70 Yale Law Journal 905, 919-920.

^{6/} Id at 919, n. 73.

v. United States, 160 U.S. 469, 486, 488, 16 S.Ct. 353, 40 L.Ed. 499 (1895), and yet it is to be denied the opportunity to have its own corresponding and verifying examination, a step which perhaps is the most trustworthy means of attempting to meet that burden. Yet that is precisely what the defense claims is appropriate here. "

In State v. Whitlow, 45 N.J. 3, 210 A.2d 763 (1965), the New Jersey Supreme Court approved the appointment of state psychiatrists to examine an accused, over his objection, as to his sanity at the time of the commission of the offense. In rejecting an argument based on the privilege of self-incrimination, the Whitlow court expressed its reasoning at page 769 as follows:

"It would be most anomalous to say that a defendant may advance the defense of insanity, have himself examined by his own experts and then invoke the constitutional guarantees against self-incrimination for the purpose of preventing examination by the State . . . [citation omitted]. It would be a strange doctrine, indeed, to permit a person charged with crime to put in issue his want of mental capacity to commit it, and in order to make his plea invulnerable, prevent all inquiry into his mental state or condition

. . . [citation omitted]. To allow the accused to obtain his own expert, and after a private and unlimited conference with him, to plead insanity, and then put forward the privilege against self-incrimination to frustrate like activities by the prosecution is to balance the competing interests unfairly and disproportionately against the public . . . " 7/

b. Reasonable cause existed for the ordering of the psychiatric examination to determine (1) defendant's mental competency to stand trial and (2) whether or not he was legally insane at the time of the offense.

On December 27, 1966, defendant's counsel sought and obtained an order appointing psychiatrist to examine the defendant. Prior to such an order being signed by the Honorable Jesse W. Custis, Federal District Court Judge, defendant's counsel moved for an order vacating said appointment. This latter motion was also granted [T.R., p. 3]. These motions were made within thirty-five days from the date of the commission of the robbery in question [R. T., pp. 69-70].

On January 5, 1967, defendant's counsel moved for and was granted an order directing the United States Marshal to

7/ See also State v. Meyers, 220 S. C. 309, 67 S. E. 2d (1951), relied on by Whitlow, supra, wherein the Meyers court also rejected a self-incrimination and due process attack on a compulsory psychiatric examination.

produce the defendant at the office of Frederick J. Hacker, M.D. for the purpose of conducting a psychiatric examination [T. R. , p. 4-6]. It was on this latter date, and contemporaneous with the defendant's motion, that the Government first made its motion for the appointment of a psychiatrist [T. R. , pp. 4-6], after having been apprised by defendant that he was going to raise the issue of insanity as a defense [see T. R. , p. 13]. In addition, since all of defendant's motions were made within a relatively short period after the commission of the offense charged, further reasonable cause existed to support a belief that he was mentally incompetent to stand trial. Such reasonable cause may be inferred in that the defendant on December 27, 1966, made the motion for an order appointing a psychiatrist and such motion, in order to have been granted, must have been made in good faith or on grounds not deemed frivolous. See Lebron v. United States, 299 F.2d 16 (D.C.Cir. 1956), cert. denied, 351 U.S. 974 (1956). Having such reasonable cause to question the defendant's mental competency to stand trial, along with the fact such reasonable cause was evident shortly over a month's period of time from the date of the offense, reasonable cause existed to believe that the defendant may have been legally insane at the time of the offense, or, at least, that the defendant would tender such a defense at trial. ^{8/} Such reasonable cause would have been evident even had defense counsel not informed the Government that the defendant was going

^{8/} It is noteworthy that the sole defense raised at trial was, in fact, that of defendant's insanity at the time of the commission of the crime.

to raise the defense of insanity at trial [See T.R. pp. 13 and 18]. ^{9/}

The Government asserts, based on the foregoing, that once the trial court was under a duty to order a mental examination pursuant to §4244, no error was committed by including in such an order, pursuant to its "inherent power", a requirement that defendant also submit to examination concerning his mental competency at the time of the commission of the offense. Upon the giving of adequate notice of the scope of the inquiry as detailed by the "Order Appointing Psychiatrist" filed January 10, 1967 [T.R., pp. 5-6], due process was afforded to the defendant. See United States v. Driscoll, supra at 137-8, reh. denied, supra at 141. ^{10/}

c. Defendant's privilege against self-incrimination was not violated because no "statements" of the defendant made to a court-appointed psychiatrist were introduced at trial.

Title 18, United States Code, §4244 provides, in part, as follows:

^{9/} See United States v. Albright, supra at 722 in which a period of approximately eleven months had elapsed between date of the offense and the granting of the order for psychiatric examination.

^{10/} The entire discussion above is based on the assumption that the order requiring an accused to submit to an examination as to his sanity at the time of the commission of the offense, such order being made under the trial court's "inherent power" but included in an order made pursuant to Title 18, United States Code, §4244, is encumbered with the same restriction of "reasonable cause".

" . . . No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding " [Emphasis added.]

From a reading of this portion of §4244 it clearly appears that Congress was appreciative of the possibility of an accused refusing to consent to being examined by a court-appointed psychiatrist prior to trial. As so limited, however, §4244 would bar, at trial, all statements made by the accused during such an examination from being introduced on the issue of an accused's guilt. A review of the trial record herein will reflect that the only person that elicited any statement made by the defendant to a court-appointed psychiatrist was counsel for the defendant [See, e.g. R.T., pp. 511-512].

The evidentiary restriction clearly enunciated in §4244 adequately protects an accused's privilege against self-incrimination, especially, in cases like the one at hand, where the issue of guilt or innocence in a factual sense is no longer extant at the time the court-appointed psychiatrists testify. ^{11/}

^{11/} See Ashton v. United States, 324 F.2d 399 (D.C. Cir. 1963) which indicates a relaxation of §4244 restrictions where
(Continued)

2. The Trial Court Acted Reasonably in Conditioning Defendant's Assertion of an Insanity Defense at Trial Upon His Cooperating with Court-Appointed Psychiatrists.

The trial court properly concluded, based on the foregoing discussion, that defendant could not refuse to cooperate with the court-appointed psychiatrists by invoking his privilege against self-incrimination [Memorandum Opinion, T. R. , pp. 13-16]. The defendant, on advice of counsel refused to cooperate with any psychiatrists other than those of his own choosing [T. R. , pp. 18-19]. He was then ordered to cooperate with court-appointed counsel or be precluded from offering any evidence upon the defense of insanity [T. R. , p. 22].

As demonstrated in the discussion above, the defendant had the duty to comply and not the right to refuse to comply with the trial court's order to submit to an examination by court-appointed psychiatrists. The order conditioning the raising of an insanity defense on cooperating with the court-appointed psychiatrists was obviously designed to effectively compel compliance with the trial court's order appointing said psychiatrists. In the recent case of State v. Obstein, 52 N. J. 516, 247 A.2d 5 (1968), the New Jersey Supreme Court stated at page 12, in dictum, as follows:

11/ (Continued)

there is no longer an issue as to whether an accused committed the acts which constitute the offense.

"If a defendant stands mute at the examination or cooperates except for a refusal to discuss the alleged criminal event, at the trial his own psychiatrists will not be permitted over the State's objection to testify to the history of the event given to them. [citing State v. Whitlow, supra]. Further if, as is generally the case, defendant's psychiatrists required the history in order to form an opinion as to insanity, they would be precluded from testifying to that opinion." 12/

The Government submits, therefore, that the trial court issued its order appointing the psychiatrist on a proper and reasonable condition designed to promote compliance thereto and a just trial of the issues. A review of the record will clearly reflect that the trial herein denied neither party its right to a fair trial on the merits. Neither the Government nor the accused is entitled to a favorable verdict based on surprise or secrecy. See Featherson v. Clark, 293 F.Supp. 508, 517 (W.D. Texas 1968).

12/ See also, State v. Whitlow, supra, at 775 where it was stated that:

"If a defendant is capable mentally of cooperating to the extent deemed necessary by the doctors, and he fails or refuses to do so, on motion of the state the defense psychiatric testimony shall be limited to the same extent"

B. THE TRIAL COURT DID NOT ERR BY INSTRUCTING THE JURY ON THE DEFENSE OF INSANITY IN THE TERMS OF THE TEST PRESENTLY APPROVED BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, NAMELY THAT INSTRUCTION CONTAINED IN MATHES AND DEVITT, FEDERAL JURY PRACTICE AND INSTRUCTIONS, §10.14.

1. The Underlying Rationale Expressed in Sauer v. United States, 341 F.2d 640 (9th Cir. 1957), cert. denied, 354 U.S. 940 (1957) Remains Viable Today.
-

Defendant urges that this Court adopt the insanity test proposed by the American Law Institute which provides as follows:

" (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law."^{13/}

In Sauer v. United States, supra, this Court refused to depart from the insanity test approved by the United States

^{13/} MODEL PENAL CODE, §4.01 (Proposed Official Draft 1962); See Supplemental Record on Appeal, "DEFENDANT'S PROPOSED SPECIAL JURY INSTRUCTION NO. 1".

Supreme Court in the case of Davis v. United States, 165 U.S. 373 (1897). The test approved in Davis v. United States, supra at 378 was expressed as follows:

" The term 'insanity' as used in this defense means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing, or where, though conscious of it and able to distinguish between right and wrong and know that the act is wrong, yet his will, by which is meant the governing power of his mind, has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control." 14/

Such a formulation was, in essence, the instruction given below [R.T., pp. 621-622]. Although in Sauer v. United States, supra, the Court dealt with a proposed adoption of the test enunciated in Durham v. United States, 214 F.2d 862 (D.C.Cir. 1954), its language is equally applicable in the present case. The Court in Sauer v. United States, supra,

14/ This test is commonly referred to as the "M'Naghten plus irresistible impulse test".

recognized at page 650 that

" . . . there is another, and possibly the most significant reason, why this Court must refuse to modify existing law. Many observers implicitly assume in their criticism of present law that if the accused is set free on the criminal side that he will be confined on the civil. Unfortunately that is not the case. If it were, this court might be much more disposed to alter its current views. The choice today in this jurisdiction is not between confinement and commitment, but rather between confinement and freedom. "

The Sauer Court therefore concluded at page 652 that

" . . . it is not for this court to undertake a drastic revision in the concept of criminal responsibility, a task which would necessitate a searching analysis of philosophies, purposes, and policies of the criminal law, and which might substitute freedom of insane persons for either confinement or commitment. If change there is to be, it must come from a higher judicial authority, or from the Congress. "

The above-quoted reasoning of the Court in Sauer v.

United States, supra, retains its validity today, as no federal commitment procedure exists, with the exception of that of the District of Columbia, by which an accused, acquitted on the grounds of mental irresponsibility, would be subjected to formal observation and treatment. 15/

An acceptable standard of responsibility in the federal courts, however verbalized, must in the last analysis, reflect the moral judgment of the community as to whether it is just to punish a defendant in view of his mental condition at the time of the crime. Basically, this standard flows from the pre-suppositions of our Judeo-Christian heritage that punishment properly may be imposed only upon a free agent, acting with a guilty mind, and, conversely, that one whose power of free choice -- i. e. , whose moral sensibilities are overborne as a consequence of mental disease -- may not ethically be the object of society's censure. This fundamental premise springs from society's paramount interest in civilized self-preservation. In order to survive, a civilized community must assure that those who have defied its fundamental rules for the protection of persons and property--whether they have done so as a result of

15/ See D. C. Code Ann. §24-301(d) which provides as follows:

"If any person tried upon an indictment or information for an offense, or tried in the Juvenile Court of the District of Columbia for an offense, is acquitted on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill. "



mental illness and are in need of psychiatric care, or freely and with a guilty mind--are deterred from breaking them again. A workable standard of insanity must, therefore, accommodate both our moral sense of justice and our concern for safety and order; it must, in short, impose blame only when it is morally conscionable to do so, and, at the same time, avoid wherever possible the release of law-breakers who, while they may have emotional and mental problems, could have conformed to the requirements of law had they but exercised their existing thought processes and capacity for self restraint.

This standard -- which makes moral blameworthiness the touchstone of whether to place an individual in restraint or to give him his liberty -- might be subject to relaxation if there were a choice between convicting and imprisoning an accused raising the insanity defense, and acquitting him and placing him in a mental institution for examination and treatment; for then either disposition would avoid the immediate release of one who might as a consequence of his mental illness repeat his pattern of antisocial conduct. Such circumstances, in which both the individual and community would gain from expert therapy in the setting of a mental hospital, might justify a treatment, rather than morally oriented standard of criminal responsibility. Such a possibility, however -- hospitalization and formalized treatment of a defendant acquitted on grounds of mental irresponsibility -- while available in some form or another in the vast majority of the states and in the District of Columbia is not available in other federal

jurisdictions. In this Circuit, as in nine other Circuits, the choice, where an insanity defense is interposed, lies only between sending an accused to prison, with its limited opportunities for concerted psychiatric treatment, or setting him free of any federal restraint. It is not meant to be implied that because of these narrow choices psychiatric trial testimony in the federal courts should be restricted or that a jury should be concerned only with questions of "right and wrong". On the contrary, the Government proposes the widest latitude for expert testimony and believes that in passing on claims of insanity the jury should be directed in the clearest possible terms to evaluate an accused's entire personality -- i. e. , his capacity for choice and his ability to control his conduct, as well as his knowledge of the nature and meaning of his acts and his conscious awareness of those acts. The Government urges only that the immediate consequences of an acquittal in the federal courts -- the freeing of the accused from restraint -- should have a critical bearing on the choice of an appropriate standard of responsibility; it should tip the scales in favor of an approach which retains as its core the concept of moral responsibility.

Where a finding of not guilty by reason of insanity usually results not in a defendant going free of societal control, but in the restraint of hospitalization, there is more leeway for the adoption of a test which rests to a measurable degree on purely medical considerations. For example, a finding of insanity in the District of Columbia results not in a defendant's immediate

freedom, but in his confinement in a mental hospital at least for a determination of present mental competency and dangerousness.

The interest in public safety and security would strongly militate against the adoption of a medically oriented standard where no corresponding system of commitment statutes are in force at all. Accordingly, when the issue of insanity is raised at a criminal trial held in a federal district court outside the District of Columbia, the crucial choice is not between imprisonment and hospitalization. The much more difficult issue is raised of whether to impose the restraint of imprisonment or chance the danger of a repetition of anti-social behavior by immediate release of the defendant into the community whose laws he has just violated. In such circumstances, the public safety, as well as the humanitarian desire to treat the mentally ill wrongdoer, reinforce the need to retain a morally oriented standard of responsibility.

The necessarily close relationship and interaction between the insanity defense and the ready availability of commitment procedures has been variously commented upon. As Mr. Justice Clark trenchantly pointed out in Lynch v. Overholser, 369 U.S. 705, 720 (1962) [dissenting on other grounds] that the

" . . . insane offenders are no less a menace to society for being held irresponsible, and reluctance to impose blame on such individuals does not require their release. The community has an interest in protecting the

public from antisocial acts whether committed by sane or insane persons. We have long recognized that persons who because of mental illness are dangerous to themselves or to others may be restrained against their will in the interest of public safety and to seek their rehabilitation. . . . "

In sum, until there are uniform commitment procedures applicable to acquitted defendants in federal criminal cases -- by Congressional enactment or some other formalized state-federal arrangement -- the test for insanity in the federal courts in most cases realistically involves the determination, not of who shall go to a mental hospital and who shall go to prison, but of who shall go free rather than be held in restraint. Since that is the ultimate issue, the insanity test must, of necessity, rest on considerations of moral blameworthiness.

It is worthy to note in this regard that the American Law Institute, in a related section of the MODEL PENAL CODE, provides for mandatory commitment to a mental institution of a defendant acquitted under an insanity plea. ^{16/} In such a statutory

^{16/} MODEL PENAL CODE, §4.08 (Proposed Official Draft 1962) which provides as follows:

"When a defendant is acquitted on the ground of mental disease or defect excluding responsibility, the court shall order him to be committed to the custody of the Commissioner of Mental Hygiene [Public Health] to be placed in an appropriate institution for custody, care and treatment."

framework -- where there need be no concern that a finding of not guilty risks the danger of an immediate repetition of anti-social behavior by the acquitted defendant -- there may be justification for the adoption of a test which lends itself to the acquittal of the medically ill, albeit morally blameworthy defendant, on the theory that both the accused and society will be better served by treatment of the accused in a mental hospital instead of his incarceration in prison.

2. The Holding of Sauer v. United States,
 supra, Has Been Consistently Re-
 affirmed in This Circuit, And There
 is Nothing in the Record of This Case
 Which Justifies a Departure From
 Those Rulings.
-

In Smith v. United States, 342 F.2d 725 (9th Cir. 1965), the defendant therein requested an instruction based on MODEL PENAL CODE §4.01. A clinical psychologist had testified that Smith was a paranoid schizophrenic; that his condition was severe, having begun during adolescence, and was operative at the time of the crime; that his actions were beyond his control; at the time of the crime Smith did not know right from wrong; and as a result of the disease which Smith suffered, he was not possessed of substantial capacity to conform his conduct to the requirement of the law. Cf. Smith v. United States, supra, at 726. After reviewing the decision in Wion v. United States, 325 F.2d 420 (10th Cir. 1963), cert. denied 377 U.S. 946 (1964), which adopted



the MODEL PENAL CODE §4.01 formulation, the Smith court rejected said decision after not finding it "sufficiently persuasive to change the rules of this Circuit as set forth in Sauer." Smith v. United States, supra at 726.

In the recent decision of Ramer v. United States, C.A. 21,985 (9th Cir. May 15, 1969), a panel of this Circuit once again rejected a request to depart from the insanity test expressed in Sauer v. United States, supra. In Ramer v. United States, supra at 20, the court recognized that there was

"evidence before the jury from which it might have been concluded that, while the appellant knew right from wrong and understood the nature of his act, he still, because of the condition of his mind, committed acts which were beyond his control, i. e. , were uncontrollable acts " 17/

The defendant therein had requested a jury instruction in the terms of the MODEL PENAL CODE §4.01 formulation. Ramer v. United States, supra at 11, n. 10. The trial court in Ramer had rejected the proposed instruction and instructed the jury in almost the identical terms as were employed by the trial

17/ The psychiatrists who testified had concluded that Ramer suffered from a character disorder which was usually manifested by "poor impulse control". Ramer v. United States, supra at 20.



herein. Ramer v. United States, supra at 10, n. 8. The Ramer Court, after reiterating its holding in Maxwell v. United States, 368 F.2d 735 (9th Cir. 1966) that the instruction given embodies the "uncontrollable act" test, found no error had been committed and that said instruction was "as favorable to the appellant as he was entitled". Ramer v. United States, supra at 20.

The Government submits that a review of the testimony of Drs. Hacker and Cohn, as set forth in Appellant's Opening Brief at pages 19-21, reflects no facts or opinions upon which a meaningful distinction could be drawn between the case herein and those of Smith v. United States, supra, and Ramer v. United States, supra. The defendant has not adequately demonstrated that the evidence in this case warrants a departure from the long-approved insanity test of this Circuit, nor has he demonstrated that prejudice resulted from a failure to give his proffered instruction. Under such circumstances, it is urged that the case herein is not an appropriate one to adopt a new formulation with respect to mental culpability. 18/

18/ It should be noted that this Circuit has also considered and refused to reject the holding in Sauer v. United States, supra, in the following cases: Johnson v. United States, 406 F.2d 1111 (9th Cir. 1969); Oliver v. United States, 396 F.2d 434 (9th Cir. 1968); Ramer v. United States, 390 F.2d 564 (9th Cir. 1968); and Church v. United States, 390 F.2d 564 (9th Cir. 1968).

CONCLUSION

Based on the foregoing discussion, the Government respectfully submits the following conclusions:

(1) No error was committed by the trial court in conditioning defendant's raising of his insanity defense upon his submitting to a mental examination by a court-appointed psychiatrist and his affording said psychiatrist such cooperation and information as may be required in properly conducting said examination.

(2) The trial court properly refused defendant's proposed insanity instruction and correctly instructed the jury as to the test applied in the United States Court of Appeals for the Ninth Circuit.

"The right and wrong test has withstood the onslaught of critics, not because it is scientifically perfect, but because the courts regard it as the best criteria yet articulated for ascertaining criminal responsibility which comports with the moral feelings of the community."

Sauer v. United States, supra at 649.

Respectfully submitted,

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NO. 22660

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LERROY MORRIS COCKRELL and
IVY DELL COCKRELL,

Petitioners and Appellants,

v.

E. J. OBERHAUSER and
LIVERNA CARTER,

Respondents and Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PETITION FOR REHEARING

AND

SUGGESTION FOR REHEARING IN BANC

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEROY MORRIS COCKRELL and
IVY DELL COCKRELL,

NO. 22660

Petitioners and Appellants,

v.

E. J. OBERHAUSER and
IVERNA CARTER,

Respondents and Appellees.

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING IN BANC

TO THE HONORABLE STANLEY N. BARNES, AND SHIRLEY M. HUFSTEDLER,
CIRCUIT JUDGES, AND GUS J. SOLOMON*, DISTRICT JUDGE:

Appellee respectfully requests a rehearing for the purpose of reconsideration of the applicability to this case of the principles enunciated in Griffin v. California (1965), 380 U.S. 609, 85 S. Ct. 1229, and Bruton v. United States (1968), 391 U.S. 123, 88 S. Ct. 1620, upon which the reversal as to Leroy Morris Cockrell was based.

Appellee respectfully suggests that a rehearing in banc would be appropriate because the questions involved are of exceptional importance. Rule 35(b), Rules of Appellate Procedure.

QUESTIONS PRESENTED

(1) Is Griffin, which under the Fifth Amendment proscribes comment or instructions to the jury in a trial by

* Chief Judge, U.S. District Court, Portland Oregon, sitting by designation.

jury on inferences to be drawn concerning a defendant's failure to testify at trial applicable where (a) the defendant testifies; (b) trial was by the court and not by jury; (c) there was no comment; (d) in a pre-Escobedo^{1/} trial there was testimony that the defendant remained silent in the face of an extra-judicial accusation by a co-conspirator after being given an opportunity to speak; and (e) the defendant testified at the trial that he remained silent on the advice of his attorney?

(2) Is Bruton, which holds that a defendant's Sixth Amendment right of confrontation has been violated in a joint trial by the admission of a confession by a co-defendant made out of his presence and inadmissible hearsay as to him applicable where (a) the subject confession was made in the presence of the defendant; (b) one of the crimes charged and to which the confession related was a conspiracy; and (c) at the time of trial the confession was admissible against the defendant under traditional rules of evidence?

ARGUMENT

I

We respectfully request reconsideration by this Honorable Court of its opinion, which holds that an accusatory confession by co-defendant Phillips in Leroy's presence, together with evidence that the officer asked Leroy what he had to say about "that," and that Leroy remained silent, was

1. Escobedo v. Illinois (1964), 378 U.S. 478;
Johnson v. New Jersey (1966), 384 U.S. 719.

incorrectly admitted on the theory that Leroy's silence in the face of an accusatory statement was an implied admission of guilt, and that receipt of that testimony violated Leroy's Fifth Amendment privilege against self-incrimination under Griffin v. California (1965), 380 U.S. 609.

Appellee respectfully submits that mere evidence of silence in the face of an accusation is not within the Griffin rule, and that the holding by the United States District Court in its Order Denying Petition for Writ of Habeas Corpus was correct in stating that "the requirements of [Griffin] are not applicable" to this case.

Griffin is concerned only with comment or instructions to a jury on the inferences it should draw from the fact that a defendant refuses to testify. It specifically states,

" . . . What the jury may infer [from evidence of failure to testify], given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another. . . .

"

" We . . . hold that the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is

evidence of guilt." (Emphases added.) Griffin
v. California (1965), 380 U.S. 609, 614, 615.

California's voluntary extension of the Griffin rule does not require retroactive enforcement by the federal courts. McClain v. Wilson, 370 Fed. 2d 369, 370 (1966, Ninth Circuit).

There is nothing in the Griffin decision which has any detrimental application to the facts of the Cockrell case. The evidence that Leroy remained silent in the face of an accusation was a fact as properly before the trier of fact as it was evident to the jury in Griffin, that Griffin failed to take the stand in the face of the testimony against him. Evidence of the mere omission, therefore, in response to a direct question, where relevant and material, cannot be inadmissible on the basis of the Fifth Amendment. It is evidence of conduct, not testimony. Griffin in no way intimates that it is error, nor could it on its facts, since Griffin's omission to testify in response to the damaging testimony against him was a fact clearly evident to the jury. The jury could infer what it chose.

Griffin in no way proscribes evidence of silence, nor does it in any way inhibit the inferences that may naturally be drawn therefrom. Neither does it hold that the prosecution must not present evidence against a defendant if he refuses to testify. Yet that is the effect of the Cockrell application, which holds that since he refused to speak, both the statement by Phillips incriminating him and evidence of his silence were erroneously admitted.

Silence in the face of an accusation, together with an opportunity to explain or deny, is evidence of conduct from which the inference that it is an implied admission of guilt may reasonably be drawn. It is, however, only an inference, and may be refuted. Leroy did refute it, and testified not only that he was silent only because his attorney had told him to on a prior occasion, but also denied the substantive matter contained in Phillips' accusation. The court, therefore, as the trier of fact, was faced with no more than a conflict in the evidence, a matter of credibility, a question of fact and not of law.

In other words, a defendant cannot claim that his assertion of his privilege not to be compelled to testify under the Fifth Amendment protects him from prosecution, neither can he claim protection from natural inferences to be drawn from his failure to controvert or explain the evidence against him when given an opportunity to do so, whether this failure is in or out of court. "No constitution can prevent the operation of the human mind." Griffin, p. 1237 (dissent by Mr. Justice White).

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II

Appellee further respectfully requests a rehearing for the purpose of reconsidering the applicability of Bruton v. United States (1968), 391 U.S. 123; 88 S.Ct. 1620.

The opinion of this court holds that the admission against Leroy Cockrell of Phillips' confession violated his Sixth Amendment right of confrontation which compels reversal of his conviction. Reference here is to Phillips' second confession which was made in Leroy's presence, since the first was not admitted against him (Rep. Tr. pp. 198, 201-203) and as the opinion states as to Ivy Cockrell the Bruton rule does not apply because the trial was by court and not by jury and "Nothing in Bruton suggests that a judge is incapable of applying the law of limited admissibility which he has himself announced."

The second confession, made in Leroy's presence, was admitted against him (Rep. Tr. pp. 203-207), and is the subject herein.

This confession was, of course, admissible against Phillips. It was relevant, however, not merely for that reason, but as a declaration by a co-conspirator concerning a conversation between herself and Leroy made during the conspiracy in furtherance of the conspiracy to sell marijuana, one of the counts with which they were charged. It was thus admissible against Leroy as a well-established exception to the hearsay rule.

". . . [I]t is firmly established that where made in furtherance of the objectives of a going conspiracy, such statements are admissible as exceptions to the hearsay rule. This prerequisite to admissibility, that hearsay statements by some conspirators to be admissible against others must be made in furtherance of the conspiracy charged, has been scrupulously observed by federal courts." Krulewitch v. United States (1949), 336 U.S. 440, at 443-444; 69 S.Ct. 716. See People v. Gant, 252 Cal. App. 2d 101, 110, 60 Cal. Reprtr. 154; People v. Morales, 263 Cal. App. 2d 368, 374-375, 69 Cal. Reprtr. 402.

Where a party to a confession or admission, as Leroy was in this case, is himself present in court and can and does, as he did, testify in explanation or contradiction of the prior statement or conduct, no exclusionary rule can reasonably be invoked on the basis of a violation of his Sixth Amendment right of confrontation.

In Bruton, the evidence was admissible against a codefendant, but inadmissible against Bruton. The jury was instructed that "a confession made outside of court by one defendant may not be considered as evidence against the other defendant, who was not present and in no way a party to the confession," (emphasis added) and that it should disregard the therefore inadmissible hearsay evidence. This was in accord with the rule enunciated in Delli Paoli v. United States (1957), 352 U.S. 232, 77 S. Ct. 294, 1 L.Ed. 2d 278,

which Bruton overruled.

The Court in Bruton stated as follows in footnote 3, 391 U.S. 123, at p. 128:

"We emphasize that the hearsay statement inculping petitioner was clearly inadmissible against him under traditional rules of evidence, (Citations.) There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause. (Citations.)"

We have in the testimony here under discussion a confession, which was a declaration made by an unavailable witness (an exception to the hearsay rule), relating a conversation between the declarant and the defendant Leroy during the conspiracy and in furtherance thereof (an exception to the hearsay rule), made in the presence of the defendant Leroy (an exception to the hearsay rule). The testimony was, therefore, admissible against both the declarant and Leroy under traditional rules of evidence.

Pointer v. Texas (1965), 380 U.S. 400, was decided two years after the trial in this case but eight months prior to the decision by the California Supreme Court in the case. No issue under Pointer has ever before been suggested until mere citation to the case in the opinion upon which this rehearing is requested. The State courts have never had an opportunity to rule on the applicability of either Pointer

or Bruton herein and state remedies, therefore, have manifestly not been exhausted.

Even if Pointer has any application to this case, which we in no way concede, there still remain two other recognized exceptions to the hearsay rule relating to the fact that this was a conspiracy trial and Leroy was present at the confrontation.

In reversing as to Leroy, on tenuous technical grounds, the court is releasing a narcotic dealer who was found in possession of enough marijuana to make 30,000 cigarettes. Furthermore, Leroy was convicted of three separate counts, sale of marijuana (Count II), possession of marijuana for sale (Count VI), and conspiracy to sell marijuana (Count VII). The Court has failed to state on which counts the convictions are reversed by the reversal of the denial of the writ. The confession-accusation is clearly not applicable to Count VI.

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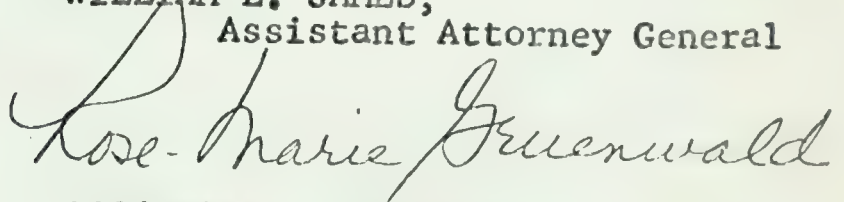
CONCLUSION

For all of the foregoing reasons, questions of exceptional importance relating to evidence admissible by the prosecution in its proper function as a representative of the People in a criminal trial, a rehearing is respectfully requested.

Respectfully submitted,

THOMAS C. LYNCH, Attorney General

WILLIAM E. JAMES,
Assistant Attorney General

A handwritten signature in cursive script that reads "Rose-Marie Gruenwald". The signature is written in dark ink and is positioned above the printed name of the signatory.

ROSE-MARIE GRUENWALD,
Deputy Attorney General

Attorneys for Appellees

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JUN 2. 1969

No. 22,708✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

STADIUM APARTMENTS, INC., ET AL.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

BRIEF FOR AMICUS CURIAE--STATE OF IDAHO AND
STATE OF WASHINGTON

STATE OF WASHINGTON
BLADE GORTON,
Attorney General

FILED

JUN 18 1969

WM. B. LUCK, CLERK

STATE OF IDAHO
Robert M. Robson
Attorney General

GEORGE C. DETWEILER
Assistant Attorney General

*See Vol. 3501
also front of this (3505)
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,708

UNITED STATES OF AMERICA,

Appellant,

v.

STADIUM APARTMENTS, INC., ET AL.

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

BRIEF FOR AMICUS CURIAE--STATE OF IDAHO AND
STATE OF WASHINGTON

STATEMENT OF THE CASE

I.

Nature of the Case

This case involves an appeal by the United States from a decree entered against the Appellee and in favor of the United States, as assignee of a mortgagee, in which the United States District Court

of Idaho, Southern Division, provided for a one-year period of redemption, after foreclosure sale, pursuant to the law of the State of Idaho. (Rptr's. Tr. pp. 22-24 and R. p.71) The decree was entered by default, the Appellee making no appearance in the trial court and the Appellee has not filed a brief in this appeal.

Although generally obtaining the relief sought in the trial court, the United States bases its appeal upon alleged error by the court below in incorporating within its decree a provision allowing the Appellee a period of one year after the Marshall's sale in which to redeem the mortgage, basing that provision upon an Idaho statute allowing a one-year period for redemption of mortgages. I.C. Sec. 11-402.

II.

Statement of Facts

On November 30, 1949, Stadium Apartments, Inc., executed a mortgage as mortgagor with Prudential Insurance Company of America as mortgagee. This mortgage was insured by the Federal Housing Administration. (Rptr's. Tr. p.3 and R. pp. 8-16) Following assignment of the mortgage by Prudential to the United States, and following default by the mortgagor, the United States commenced an action to foreclose the mortgage. A decree of foreclosure by default was obtained by the United States against Stadium Apartments, Inc.

At no time in this case, either in the trial court or before this court on appeal, has an appearance been made by Stadium Apartments, Inc., nor by any other named Defendant.

ARGUMENT

As amicus curiae, it is our duty to assist this court in disposing of this appeal. In discharging this duty, we respectfully submit that this cause is in the nature of an ex parte appeal, in which no real controversy exists, upon points of law which are moot and which, if they are to be determined at all, should be decided in a contested proceeding between two adverse parties. Any alleged errors by the trial court in its application of the one-year period of redemption are harmless errors because it does not appear from the record how the United States was harmed thereby. It is provided in 28 U.S.C. Sec. 2111 as follows:

"On hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to error or defects which do not affect the substantial rights of the parties."

Harmless error in Conclusions of Law entered by the trial judge will not justify reversal of the judgment below. In Land 'Lakes Creameries, Inc., v. Commodity Credit Corporation, 308 F.2d 104 (8th Cir. 1962), the parties had agreed in their sales contract to arbitration by the Contract Disputes Board of Commodity Credit.

Appellant urged that the District Judge erred in considering legal doctrine not presented before the Contract Disputes Board. On appeal, the Court of Appeals for the Eighth Circuit said:

"By its Conclusion of Law No. VI the District Court did not change modify or vary the amount of CCC's damages as found and determined by the Contract Disputes Board. In the statement of that conclusion it is clear that the District Court did not sustain the decision of the Contract Disputes Board 'on a different legal doctrine' than that used by the Agency in ascertainment of the correct amount of damages allowed to CCC. * * * But if there was any error committed by the District Court in its statement of Conclusion of Law No. VI supra, it could be no more than harmless error and such error would not warrant any reversal of the judgment in this case. Rule 61, F.R. Civ. P., Title 28 U.S.C.A." (emphasis added)

This court and various other circuits have uniformly held that no opinion will be delivered where no real controversy exists, where the appeal is moot and where no point of law or fact is in controversy, the determination of which would be helpful in a subsequent case. Pacific Inter-Club Yacht Assn. v. Morris, 288 F.2d 886 (9th Cir. 1961); Wheeldin v. Wheeler, 280 F.2d 293 (9th Cir. 1960); Wynn v. Werner, 93 U.S.App.D.C. 363, 210 F.2d 730 (1954); Signallite Fuse Co. v. Fuse Indicator Corp. 174 F.2d 819 (3rd Cir. 1949).

Where the course of events following judgment by the trial court and prior to argument on appeal renders the appeal moot because the appellant cannot obtain relief from the Appellate Court, the

appeal will be dismissed. Such an intervening event was present in both the case at bar and in the case of Fink v. Continental Foundry & Machine Co., 240 F.2d 369 (7th Cir. 1957). In that case the District Court denied the injunctive relief sought by minority shareholders of Continental Foundry and dismissed the case on the merits. Plaintiffs had sought to enjoin the directors and officers of Continental Foundry from selling the corporate assets to Blaw-Knox Company, thereby liquidating Continental Foundry. On the same day on which the District Court denied the injunction, defendant directors, pursuant to contract, liquidated Continental Foundry and sold its assets to Blaw-Knox.

In delivering the opinion of the court, holding the appeal to be moot, Judge Wham stated as follows:

"The general law, as well as the law in this circuit, has long been established that if pending an appeal an event occurs which renders it impossible for the appellate court to grant any relief or renders a decision unnecessary the appeal will be dismissed. Selected Products Corporation v. Humphries,¹ supra, citing many cases. The court went on to say (86 F.2d 823): 'There must be an actual controversy; an appeal will not be entertained to determine moot questions, and it will be dismissed, therefore, if by act of the parties or otherwise the circumstances have so changed that it is impossible or unnecessary for the

¹Selected Products Corporation v. Humphries, 86 F.2d 821 (7th Cir. 1936).

appellate court to grant relief.' Among the cases that were cited in support of the above principle is American Book Co. v. State of Kansas, 193 U.S. 49, 24 S.Ct. 394, 48 L.Ed. 613, which, in turn, cited Mills v. Green, 159 U.S. 651, 16 S.Ct. 132, 133, 40 L.Ed. 293, where the court said: 'The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from a lower court, and without fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.'" (emphasis added)

The course of events between judgment and appeal in the Fink case and in the case at bar are analogous. In the former, corporate assets were sold to a purchaser following a dismissal of an action seeking an injunction against such a sale. When the matter reached the Court of Appeals, that court was faced with a fait accompli, the act sought to be enjoined had already been committed and relief was impossible. In the case at bar the United States District Court for the District of Idaho entered a foreclosure decree sought by the United States against Stadium Apartments, Inc. and provided therein that the defendant would have a period of one year in which to redeem the mortgaged property after sale pursuant to Idaho Statute,

I.C. Sec. 11-402. (Rptr's. Tr. pp 23-24 and R. p 71) The date of that sale is December 12, 1967. (R. 82-85) Thus, the redemption period as provided in the decree of the District Court would have ended on December 11 or 12, 1958—approximately seven months prior to the hearing of this appeal. The record does not disclose how the United States can succeed to any greater interest in the property in question than it already has at the present time by pursuing this appeal. The period for redemption has expired and, according to the record, no event has occurred to defeat the United States from succeeding to complete ownership of the property. Matters not appearing in the record will not be considered by a Court of Appeals. Brooks v. Woods, 181 F.2d 716 (9th Cir. 1950); Rogers v. Union Pac. R. Co., 145 F.2d 119 (9th Cir. 1944). There is, therefore, no remedy which Appellant can obtain from this Court for the reason that Appellant already has what it is seeking to obtain.

Upon these facts the decision and language of the opinion in the Fink case are applicable and we urge that they provide a proper disposition of the case at bar.

This appeal should be dismissed as moot for several reasons. First, as already indicated, the period for redemption of this mortgage has passed and the record does not disclose how a determination by this court of the propriety of providing for a period of redemption could affect the interest of the United States in the property

in question. Thus, in the language of the Fink case, ". . . pending an appeal an event occurs which renders it impossible for the appellate court to grant any relief . . ."

Further, there is no actual controversy involved. Judgment in the district court was obtained by default without an appearance by the Defendant. Nor has the Defendant (Appellee) filed a brief nor indicated in any way that it will participate in this appeal; there is no party before this court claiming an interest adverse to that of the United States. In the language quoted in the Fink case, ". . . there must be an actual controversy; an appeal will not be entertained to determine moot questions, and it will be dismissed, therefore, if by an act of the parties or otherwise the circumstances have so changed that it is impossible or unnecessary for the appellate court to grant relief . . ."

The case of Bunn v. Werner, supra, is also analogous to the case at bar. It involved a suit to enjoin foreclosure of certain real estate under a deed of trust securing an usurious note and to reform the note and the deed of trust. On appeal from the District Court, which had denied a preliminary injunction against a foreclosure sale, the sale had already been made. In a per curiam opinion the United States Court of Appeals of the District of Columbia stated as follows:

"When the appeal was argued counsel for each side said in open court that the foreclosure sale had taken place. It follows that this appeal must be dismissed as moot and the case remanded to the District Court for final hearing on the merits."

Just as the foreclosure sale made moot any appeal from a denial of an injunction against such a sale in the Bunn case, so in the case at bar, the expiration of the one-year redemption period provided in the decree of the court below has rendered this appeal moot.

CONCLUSION


Because of the somewhat peculiar circumstances of this case, in that only one adverse party is participating in an appeal upon a point of law which, according to the record, does not affect the rights of that party as determined by the trial court, it is altogether fitting that we as an amicus curiae urge that this court may properly refuse to deliver what amounts to an advisory opinion on an abstract point of law, in an ex parte appeal.

If, as the United States has urged, public policy demands that the issues it raises in this appeal be decided, this should be done in an adversary proceeding in which an actual controversy exists.

STATE OF WASHINGTON
BLADE GORTON,
Attorney General

STATE OF IDAHO
Robert M. Robson,
Attorney General

By


GEORGE C. DETWEILER,
Assistant Attorney General

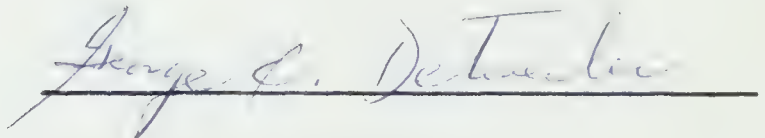


CERTIFICATE OF MAILING

I hereby certify that I have on this 17th day of June, 1969,
served the foregoing brief of Amicus Curiae upon the Appellant by
placing two (2) true and correct copies of the same in the United
States mail, postage prepaid, addressed to:

Mr. Clarence D. Suiter
Assistant United States Attorney
District of Idaho
550 West Fort Street
Boise, Idaho

ATTORNEY FOR APPELLANT

A handwritten signature in cursive script, reading "George C. Detweiler", is written over a horizontal line.

GEORGE C. DETWEILER, Assistant
Attorney General, State of Idaho



NO. 22708

JUL 7 1969

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

STADIUM APARTMENTS, INC.
et al.,

Appellees.

BRIEF
OF THE STATE OF CALIFORNIA
AS AMICUS CURIAE

FILED

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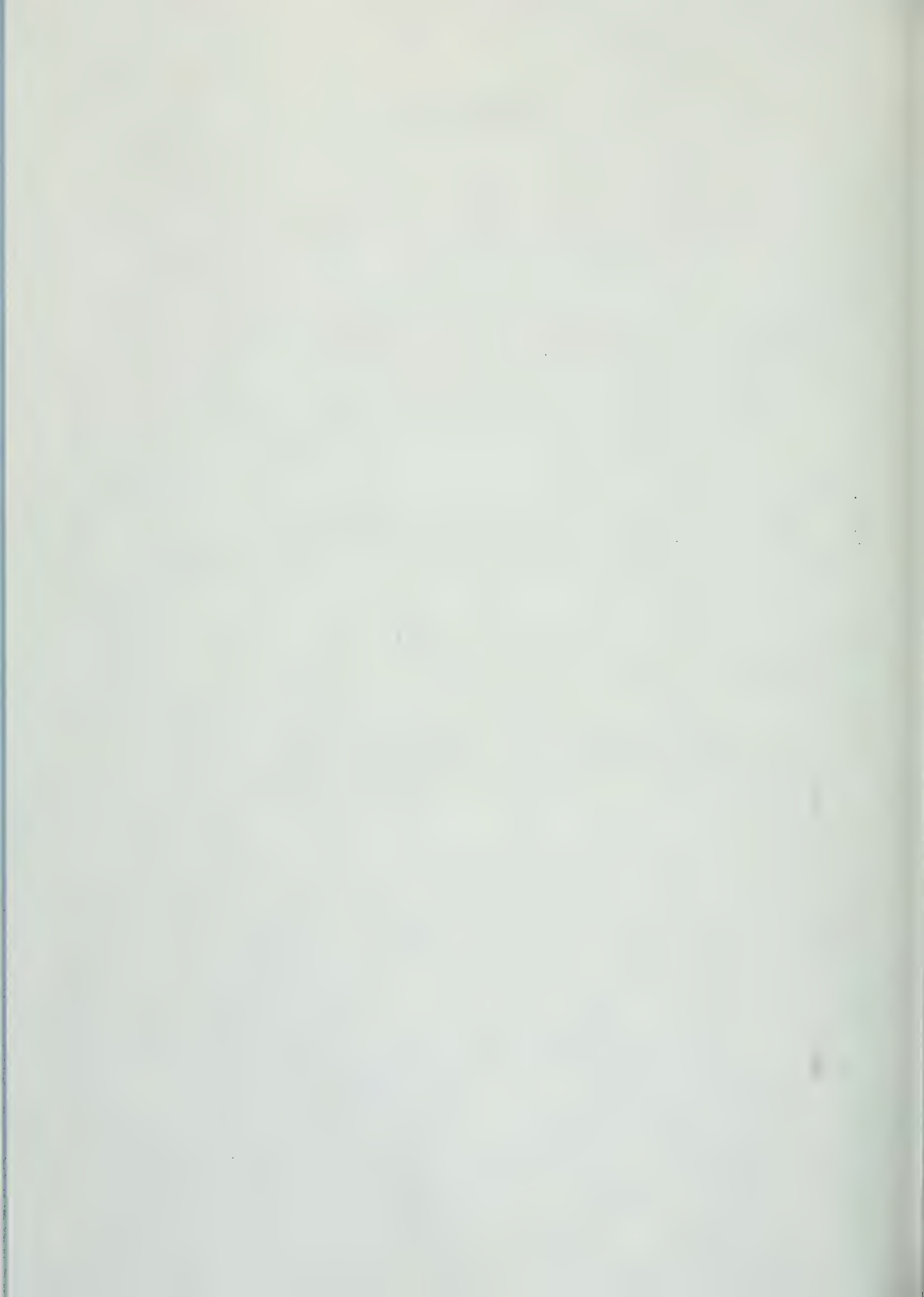
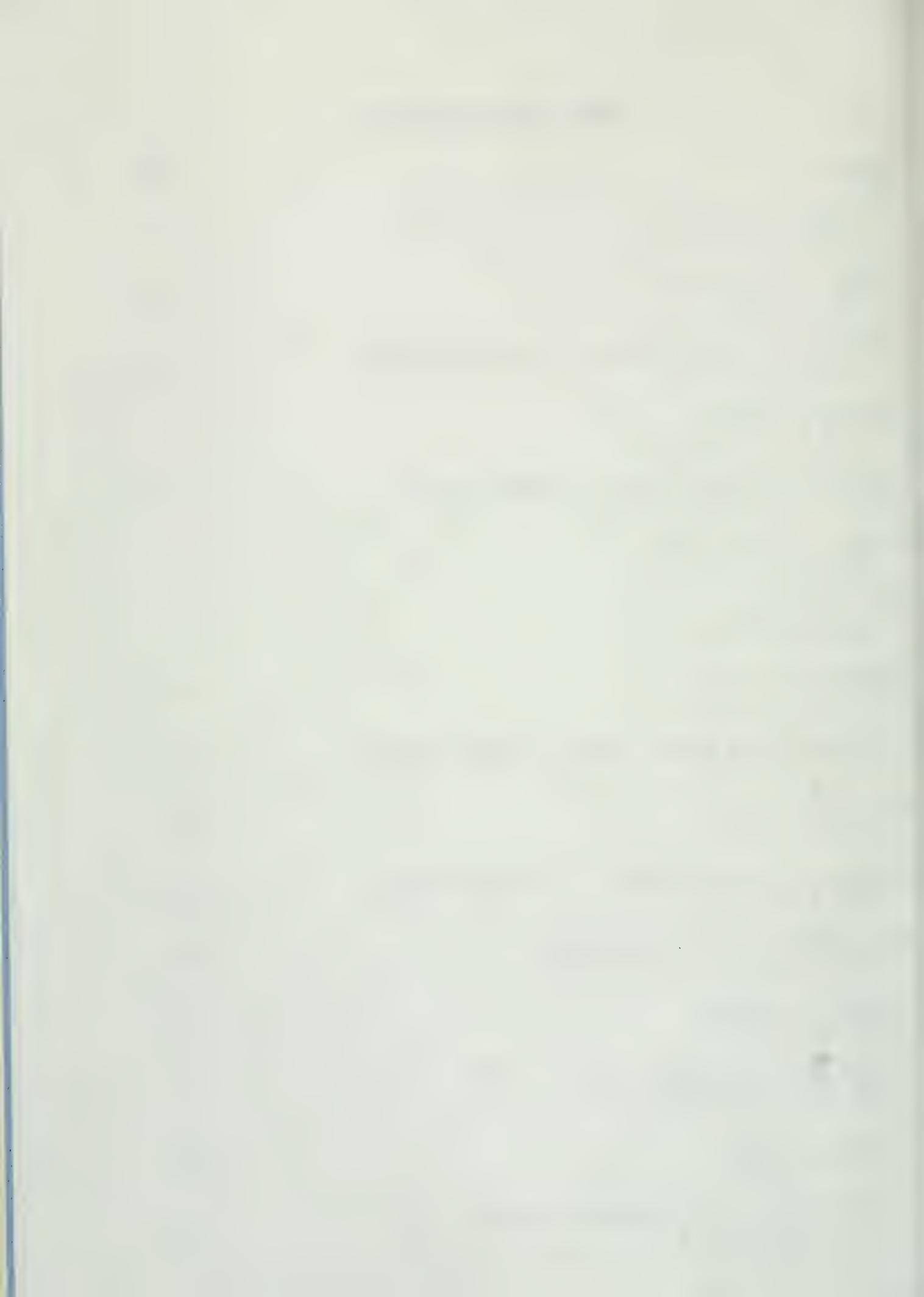


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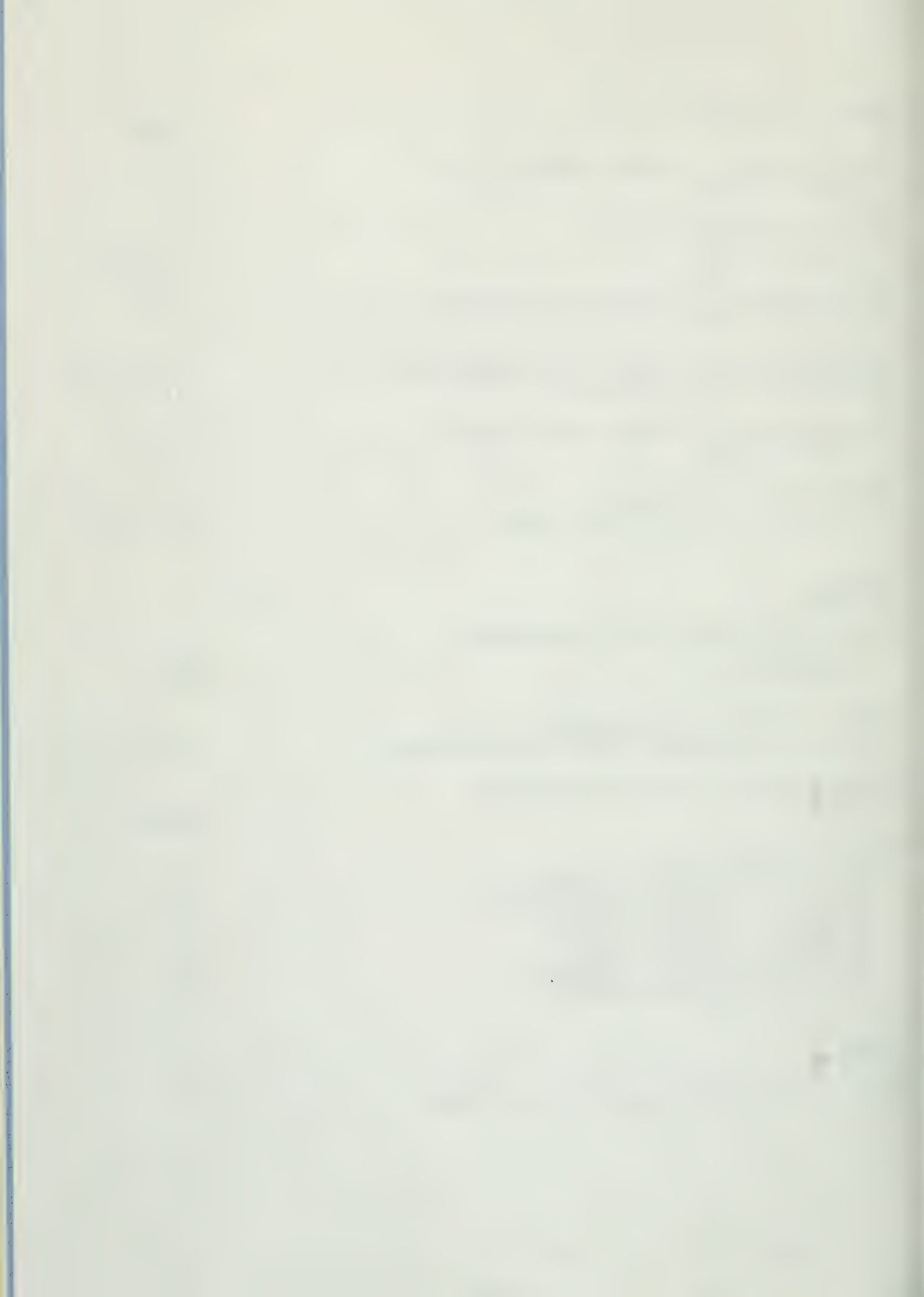
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NO. 22708

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

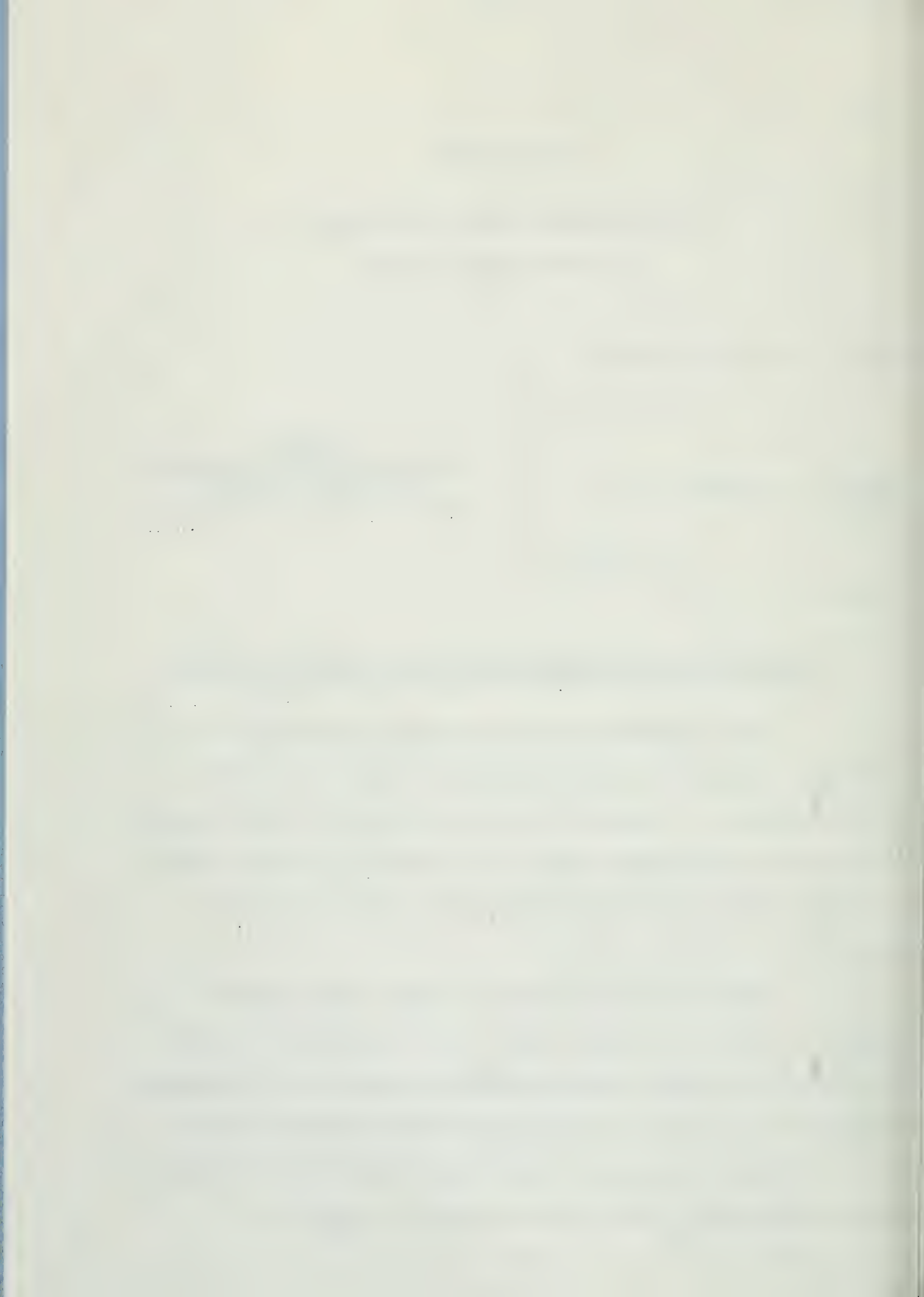
UNITED STATES OF AMERICA,
Appellant,
v.
STADIUM APARTMENTS, INC.
et al.,
Appellees.

BRIEF
OF THE STATE OF CALIFORNIA
AS AMICUS CURIAE

INTRODUCTION AND STATEMENT OF THE ISSUE ON APPEAL

The statement of the facts and statement of the case are contained in the appellant's brief. The issue of this appeal is whether or not the district court erred by including the Idaho period of redemption in the decree of foreclosure obtained by the United States in this action.

The appellant argues that this Court should fashion or adopt a federal rule that a mortgagor's right of redemption under state law does not apply to a mortgage assigned to the United States under the National Housing Act. Although the source of law applicable to the rights and obligations of the United States is federal, we



believe the rule propounded by appellant is contrary to law and contrary to sound policy. It will be argued herein that the inclusion of the Idaho redemption period in the foreclosure decree was proper for the following reasons: first, because Congress in enacting the National Housing Act adopted the mortgage and lien laws of the state in which real estate securing a loan is located; second, because the adoption of a federal rule abrogating the right of redemption conflicts with the federal regulations under which the mortgage foreclosed in this action was insured and is not even authorized by the mortgage itself; third, because the adoption of a rule abrogating the right of redemption is contrary to existing federal case law; and finally, because the creation of such a rule is not necessary for the administration of FHA programs and would disrupt state property law.

ARGUMENT

I. THE PERIOD OF REDEMPTION PRESCRIBED BY IDAHO LAW APPLIES TO THE FORECLOSURE IN THIS ACTION, BECAUSE CONGRESS INCORPORATED STATE MORTGAGE LIEN LAWS INTO THE NATIONAL HOUSING ACT RATHER THAN CREATING A SPECIAL FEDERAL MORTGAGE OR FEDERAL LIEN LAW

In facilitating the building of homes on federal credit, Congress could have created a federal mortgage and a federal lien law. It did not. Instead, it provided a system of insurance of mortgages existing under state laws.



The term mortgage is defined in the National Housing Act as follows:

"The term 'mortgage' means a first mortgage on real estate, . . .; and the term 'first mortgage' means such classes of first liens as are commonly given to secure advances on, or the unpaid purchase price of, real estate, under the laws of the State in which the real estate is located, together with the credit instruments, if any, secured thereby." 12 U.S.C. §§ 1736(a), 1707(a). (Emphasis added.)

This definition of mortgage is not a minor or incidental provision of the National Housing Act but is of crucial importance to the entire statutory scheme. By defining "mortgage" as first liens commonly given in the state in which real property is located, Congress expressly adopted state laws regarding such liens.

Under this scheme, the mortgagee receives the benefit of the insurance after default by assigning all its rights under the mortgage to the United States. 12 U.S.C. § 1743(c). The right of redemption is an important property right as recognized by federal as well as state courts. Parker v. Dacres, 130 U.S. 43; Brine v. Insurance Co., 96 U.S. 627. There is no indication in the National Housing Act that Congress intended to abolish

this very important right when an insured mortgage was assigned to the United States.

On page 19 of its brief, appellant concludes that the failure of Congress to provide for a redemption period in the National Housing Act is a forceful expression that none should exist. The congressional purpose was to adopt the laws as they exist in each state. Creation of a right of redemption in the National Housing Act would disrupt the laws in those states which do not have the right as much as abolition of the right would disrupt the laws of the states which do have it.

In United States v. View Crest Garden Apts., Inc., 268 F.2d 380, the argument that Congress adopted state law into the National Housing Act through the definition of "mortgage" was considered and criticized with reference to the showing necessary to justify appointment of a receiver under a mortgage insured under Title 2 of the National Housing Act. The court stated:

"The argument is that in adopting the state definition of 'first mortgage,' Congress intended to adopt all the incidents of the mortgage relation under state law including remedies on default and the appointment of receivers. That this is not the case is clear from reading section 1713 of the same

Act which defines certain acts as being in default (part g) and sets out certain remedies that the FHA can pursue such as institution of foreclosure (part k) proceedings without reference to whether or not there is such a remedy for the default described in the State where the property is located." 268 F.2d at 382. (Emphasis theirs.)

It is difficult to see what provisions of section 1713, parts (g) and (k), are inconsistent with state laws. However, under the doctrine of expressio unius est exclusio alterius,^{1/} the expression of exceptions to state law in section 1713, parts (g) and (k), would exclude by implication all other exceptions to state law.

Since the View Crest decision, the Supreme Court has indicated that state laws should not be replaced with reference to federally guaranteed loans unless displacement was intended by an act of Congress or by valid regulation authorized by an act of Congress (United States v. Shimer, 367 U.S. 374)^{2/} and has also indicated that federal rules will not be adopted where local interests

1. "Expression of one thing is the exclusion of another." Black's Law Dictionary (4th ed. 1951) at p. 692.

2. Discussed page 10, infra.

are important and uniformity is not (United States v. Yazell, 382 U.S. 341).^{3/}

II. THE ADOPTION OF A FEDERAL RULE
ABROGATING THE STATE RIGHT OF
REDEMPTION VIOLATES THE REGULATIONS
UNDER WHICH THE MORTGAGE HEREIN WAS
INSURED AND IS NOT EVEN AUTHORIZED
BY THE MORTGAGE ITSELF

Insurance of the mortgage foreclosed herein was governed by the regulations promulgated pursuant to section 1742, title 12 of the United States Code.^{4/} In apparent conformity with the congressional purpose to rely upon local laws relating to mortgage liens, the Housing Administrator promulgated the following regulation:

"Rights and remedies of mortgagee in event of default or foreclosure. The mortgage must contain a provision or provisions, satisfactory to the Commissioner, giving to the mortgagee, in the event of default or foreclosure of the mortgage, such rights and remedies for the protection and preservation of the property covered by the mortgage and

3. Discussed page 12, infra.

4. "The Secretary is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this subchapter." 12 U.S.C. § 1742.

the income therefrom, as are available under the law or custom of the jurisdiction."

24 C.F.R. § 580.18 (1947 Supp.). (Second emphasis added.)

This regulation clearly contemplates adoption of local law governing rights and remedies under insured mortgages, rather than adoption of uniform federal law.

Lacking evidence of congressional or even administrative intent to abrogate the state right of redemption, appellant relies on the following language of the mortgage itself.

"The Mortgagor, to the extent permitted by law, hereby waives the benefit of any and all homestead and exemption laws and of any right to a stay or redemption and the benefit of any moratorium law or laws."^{5/}

Assuming, arguendo, that a FHA mortgage form could abolish the right of redemption without statutory or regulatory authority, this language does not purport to do so. The waiver is expressly conditioned by the phrase "to the extent permitted by law." Since the United States does not have homestead, exemption, and moratorium laws, the

5. Appellant's Brief, p. 4.

law referred to is state law. Therefore, the mortgage itself incorporates state law.

III. THE CREATION OF A RULE ABOLISHING
THE RIGHT OF REDEMPTION UNDER
STATE LAW CONFLICTS WITH EXISTING
FEDERAL CASE LAW

In Clarke v. Clarke, 178 U.S. 186, the Supreme Court stated:

"It is a principle firmly established that to the law of the State in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances." 178 U.S. at 191.

Since mortgages are conveyances of land, their effect and construction are governed by the law of the state in which the land is located. The right of redemption under state law has long been recognized in federal law, because it is a property right. Parker v. Dacres, supra; Brine v. Insurance Company, supra.

Even if the right of redemption were only a matter of post judgment procedure, it would be governed by state law. A foreclosure sale is essentially an execution upon the judgment foreclosing the mortgagor's equity of redemption. Rule 69 of the Federal Rules of



Civil Procedure expressly adopts state procedure on execution and thereby limits the United States' remedies on judgments to those provided by state law. United States v. Yazell, supra, at 355; Custer v. McCutcheon, 283 U.S. 514; Fink v. O'Neil, 106 U.S. 272.

Appellant's argument for adoption of a special federal rule abolishing the right of redemption on mortgages insured by the United States is based upon the assertion that such a rule is required to protect the integrity of "nationwide mortgage insurance programs."^{6/} Appellant relies on the Supreme Court cases of Clearfield Trust Co. v. United States, 318 U.S. 363, and United States v. Shimer, supra, to support this contention.

In Clearfield the court was determining the extent of the obligation of a guarantor of a forged endorsement on a check drawn by the United States. The court held that federal law controlled federal rights, that in absence of an act of Congress the federal courts would fashion such law, and that it would adopt an uniform federal rule based on the facts of the case before it. The factual basis of Clearfield which required an uniform rule is not present in this case. In adopting an uniform rule, the court stated:

"But reasons which may make state law at times

6. Appellant's Brief, pp. 8, 13.



the appropriate federal rule are singularly inappropriate here. The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty." 318 U.S. at 367.

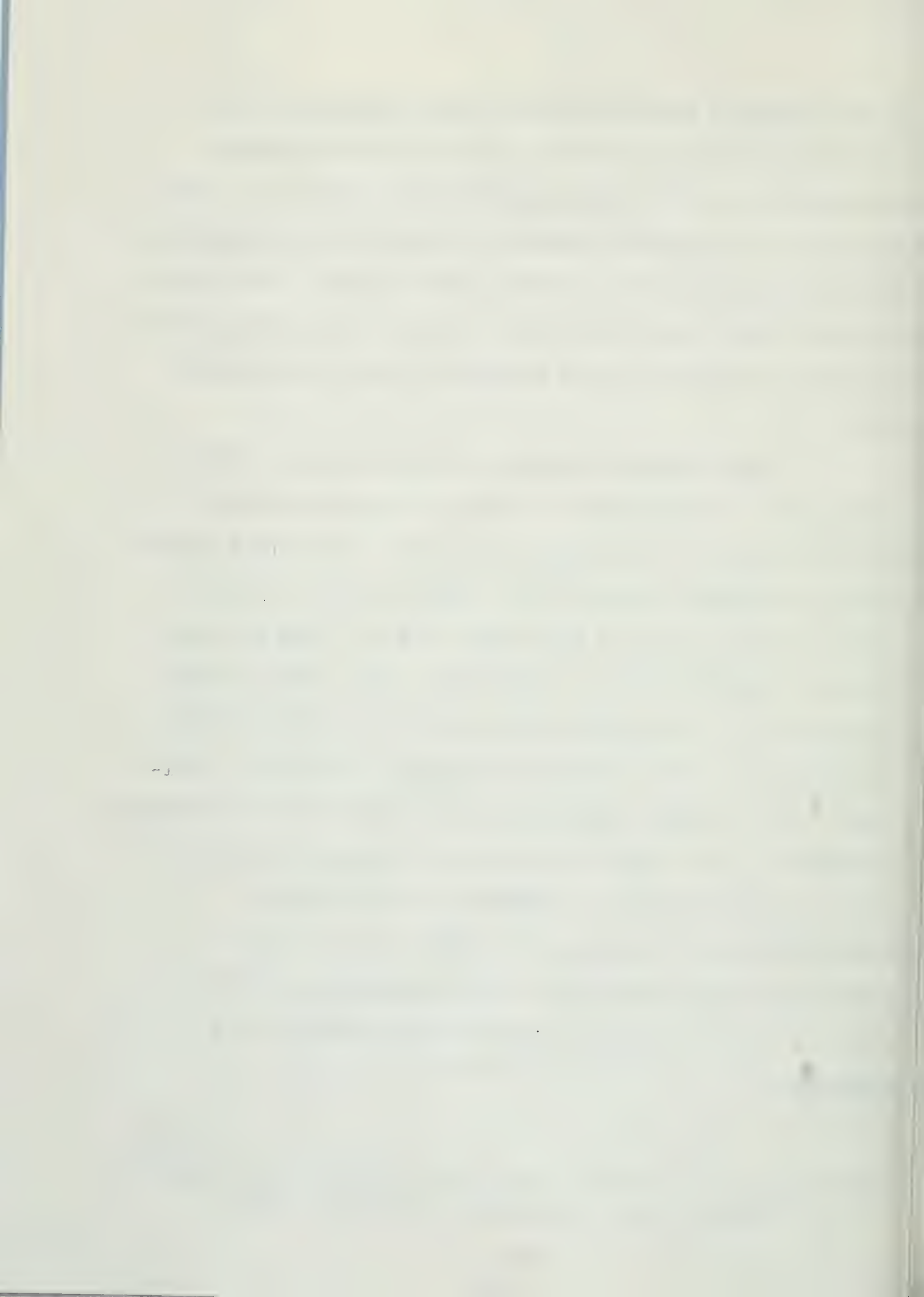
The foreclosure of a mortgage occurs in only one state, and the right of redemption is subject to the law of only one state. Clearfield is distinguishable from this case for the additional reasons that Congress has incorporated state law in the National Housing Act and that the federal courts have already recognized and adopted the right of redemption in the states where it exists.

United States v. Shimer, supra, is the only Supreme Court case cited where state laws relating to mortgages were displaced by federal law. In this case the lower court applied the Pennsylvania Anti-Deficiency Act to bar a recovery by the United States after foreclosure of a federally guaranteed loan. The Supreme Court held that application of the state anti-deficiency legislation conflicted with the regulations prescribed

by the Veterans Administration, which regulations were validly authorized by section 504 of the Serviceman's Readjustment Act.^{8/} Before reaching its conclusion, the Supreme Court carefully analyzed the applicable regulatory scheme which provided an "upset price device." The court concluded that this device was intended to and did provide the same protection as the Pennsylvania Anti-Deficiency Act.

This careful analysis and explanation of the Serviceman's Readjustment Act and the regulations prescribed thereunder strongly implies that state laws should not be overridden unless their replacement was clearly intended. In this case appellant does not show any provisions, statutory or by regulation, which were intended to replace or furnish the protection of the Idaho right of redemption. The rationale of Shimer, therefore, indicates that the Idaho redemption rule should not be abrogated. Furthermore, the right of recovery in Shimer was based on an independent right of indemnity by the Veterans Administration. The right of redemption is not an independent obligation but is an inseparable part of the property law defining the rights of the parties to a mortgage.

8. 58 Stat. 291, as amended by 59 Stat. 626.



A third Supreme Court case has an important bearing on appellant's contention that an uniform rule should be adopted. In United States v. Yazell, supra, the Supreme Court affirmed a summary judgment denying the United States recovery on a contract between the Small Business Association and a Texas woman who did not have capacity to contract under a Texas law of coverture. In holding that there was no federal interest requiring state law to be overridden, the court stated:

"Although it is unnecessary to decide in the present case whether the Texas law of coverture should apply ex proprio vigore -- on the theory that the contract here was made pursuant and subject to this provision of state law -- or by 'adoption' as a federal principle, it is clear that the state rule should govern. There is here no need for uniformity. There is no problem in complying with state law; in fact, SBA transactions in each State are specifically and in great detail adapted to state law." 382 U.S. at 357.

Since FHA transactions are also tailored to state law, there is no need for uniformity.^{9/} The court in Yazell

9. See 24 C.F.R. § 580.18 (1947 Supp.).

reasoned that family law was an important matter of local interest. The right of redemption is part of state property law, which is also important as a matter of local interest.

Appellant also relies heavily upon two Ninth Circuit cases, View Crest, supra, and Clark Investment Company v. United States, 364 F.2d 7, to support its contention. In View Crest the issue involved was the showing necessary to obtain a receiver pursuant to an express agreement contained in a FHA insured mortgage. Although the court adopted a federal rule inconsistent with state law, it expressly excluded the right of redemption from its conclusions, stating:

"It is urged that to hold that federal law applies would result in great hardship to mortgagors who would thereby be deprived of all rights under state law such as the right of redemption. We do not think that such a conclusion necessarily follows. A court confronted with that question could determine it by weighing the federal interest against the particular local policy involved. If the considerations weighed by the court suggest an adoption of local law, such as the local rule on redemption, that could be done." 268 F.2d at 383. (Emphasis added.)

Clark Investment, Inc. v. United States, supra, involved the right to rents collected during the redemption period by a receiver appointed under an insured mortgage. The court relying on View Crest also adopted a federal rule contrary to state law. As in View Crest, the court specifically recognized the state right of redemption, stating:

"The purchaser at the sale gets a title that is subject to defeasance by redemption."

364 F.2d at 10.

We believe that the adoption of federal law in both View Crest and Clark Investment is inconsistent with the adoption of state law in the National Housing Act and is contrary to the rationale of both United States v. Shimer, supra, and United States v. Yazell, supra. However, we emphasize that both View Crest and Clark Investment recognize the right of redemption and refrain from including it in the fashioning of an uniform federal rule. Furthermore, both cases are distinguishable from the case at bar because, unlike the right of redemption, the right to appointment of a receiver can be considered as a separate agreement and not a matter of property law. Cf. United States v. Shimer, supra, which holds the right to indemnity a separate agreement.

The other authorities cited by appellant have little or no bearing on its contention that an uniform

federal rule abolishing state redemption rights should be adopted. United States v. Sylacauga Properties, Inc., 323 F.2d 487, involved an appeal from an order of continuance in a foreclosure action. The court said that state law did not apply but did not indicate what state law was involved. Herlong-Sierra Homes, Inc. v. United States, 358 F.2d 300, United States v. Flower Manor, Inc., 344 F.2d 958, and United States v. Walker Park Realty, Inc., 383 F.2d 732, are per curiam decisions which involve deficiency judgments and which do not discuss the federal issues involved. United States v. Allegheny County, 322 U.S. 174, involved state taxation of federal property and does not have any bearing on the need for uniformity of law in the administration of federal mortgage insurance programs. In Madison Properties, Inc. v. United States, 375 F.2d 740, the court expressly assumed for its decision that the Washington right of redemption applied.

Appellant's footnote conclusion on page 19 of its brief that the enactment of 28 U.S.C. § 2410(c) limits by implication the right of redemption is unsound. That section grants the United States the right of redemption in all states. This in no way indicates a congressional intention to abolish the right of redemption of other persons.

IV. THE CREATION OF A FEDERAL RULE ABROGATING THE RIGHT OF REDEMPTION IS NOT NECESSARY TO PROTECT NATIONWIDE MORTGAGE INSURANCE PROGRAMS AND WOULD DISRUPT STATE PROPERTY LAWS

An uniform rule regarding the right of redemption is neither necessary nor contemplated by the FHA statutes and regulations. FHA insured mortgages are made on forms apparently tailored for each state.^{10/} The obvious reason for such tailoring is to conform to local law.

The adoption of state law has the advantage of providing a well-defined set of rules in each state. Fashioning of new federal law raises conflicts and uncertainty and, thus, undermines commercial reliance on well-defined property rules. In California, for instance, most real property loans are secured by deeds of trust. If the right of redemption is abrogated on federally insured mortgages to protect the Federal Treasury, then it follows that California regulation of the exercise of the power of sale in a deed of trust should also be abrogated.^{11/} Federal courts would probably develop federal common law principles to protect borrowers from unreasonable forfeitures and strict foreclosure.

10. 24 C.F.R. § 580.18 (1947 Supp.).

11. California Civil Code section 2924 and Code of Civil Procedure section 692 require a minimum waiting period of three months and twenty days before a power of sale may be exercised after default.

But in the meantime borrowers, lenders, title insurers, prospective purchasers, and junior lienors would be in an intolerable state of uncertainty.

The adoption of a federal rule abrogating the right of redemption would disrupt established real property law. In California a mortgage is merely a lien which must be foreclosed. Code Civ. Proc., § 744; Johnson v. Razy, 181 Cal. 342; Prussing v. Prussing, 35 Cal.App.2d 508. A purchaser at a foreclosure sale obtains bare legal title subject to defeasance upon a condition subsequent and does not receive a sheriff's deed until the period of redemption has expired. Code Civ. Proc., § 703. The mortgagor not only has a power to terminate the purchaser's estate but, also, has the right of possession. Mau, Sadler & Co. v. Kearney, 143 Cal. 506; Purser v. Cady, 120 Cal. 214. The right of redemption cannot be abrogated retrospectively even by statute. Barnitz v. Beverly, 163 U.S. 118; Haynes v. Tredway, 133 Cal. 400. Junior lienors also have a valuable right in their power to redeem. Code Civ. Proc., § 703. Adoption of a federal rule abrogating the right of redemption simply abolishes these valuable property rights.

The abolition of the right of redemption for mortgages insured by the Federal Housing Administration does not necessarily creat uniformity. Redemption rights

reflect a balancing of interests between mortgagors and mortgagees. By removing the important right of redemption, this balance is upset. States without redemption rights have other means to protect mortgagors, so the removal of the right of redemption rather than create uniformity may, in fact, create a great disparity between the protection afforded citizens of different states.

Appellant's argument that the right of redemption should be abrogated because it impairs the federal foreclosure remedy is appropriately answered by the language of the Supreme Court in United States v. Yazell, supra:

"The desire of the Federal Government to collect on its loans is understandable. Perhaps even in the case of a disaster loan, the zeal of its representatives may be commended. But this serves merely to present the question -- not to answer it. Every creditor has the same interest in this respect; every creditor wants to collect." 382 U.S. at 348.

"This Court held that Revised Statutes § 916, now Rule 69 of the Federal Rules of Civil Procedure, governed, and that the United States' remedies on judgments were limited to those generally provided by state law." 382 U.S. at 355.

The uncertainty created by the adoption of the rule propounded by appellant is demonstrated by comparing the position taken by the appellant in this case and its position in Clark Investment, Inc. v. United States, supra. In Clark Investment the Idaho period of redemption was included in the foreclosure decree and was recognized by this Court. Appellant rationalizes this by asserting that it consented to redemption in Clark Investment, apparently as a matter of grace.^{12/} Thus, the existence of the very important right of redemption would seem to depend on the consent and grace of the Federal Housing Administration agents and attorneys acting without statutory or regulatory control.

CONCLUSION

The inclusion of the Idaho period of redemption in the foreclosure decree should be affirmed, because the National Housing Act and applicable regulations contemplate reference to state law. The decision of the district court should also be upheld on the ground that federal case law already recognizes the right of redemption as a property right incorporated into federal law.

Finally, if the Court considers the question as one of fashioning an applicable rule, it should adopt the

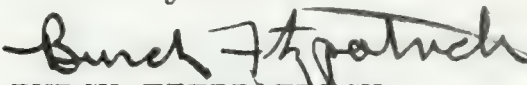
12. Appellant's Brief, p. 18.

state law of redemption, because the importance of reliance on settled property law and the preservation of valuable property rights far outweigh any need for uniformity.

DATED: June 26, 1969
San Francisco, California

Respectfully submitted,

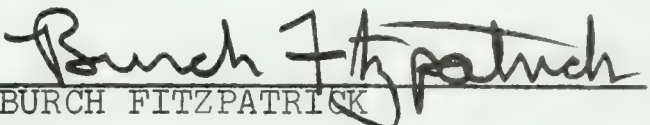
THOMAS C. LYNCH
Attorney General


BURCH FITZPATRICK
Deputy Attorney General

Attorneys for Amicus Curiae

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


BURCH FITZPATRICK
Deputy Attorney General



IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 22,708

JUN 2 1969

UNITED STATES OF AMERICA,

Appellant,

- v -

STADIUM APARTMENTS, INC., ET AL.

Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

BRIEF FOR AMICUS CURIAE - STATE OF ARIZONA

STATE OF ARIZONA
Gary K. Nelson
The Attorney General

LEONARD M. BELL
Assistant Attorney General
159 Capitol Building
Phoenix, Arizona 85007

Attorneys for the
STATE OF ARIZONA

FILED
JUN 23 1969
WM. B. LUCK, CLERK



IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 22,708

UNITED STATES OF AMERICA,

Appellant,

- v -

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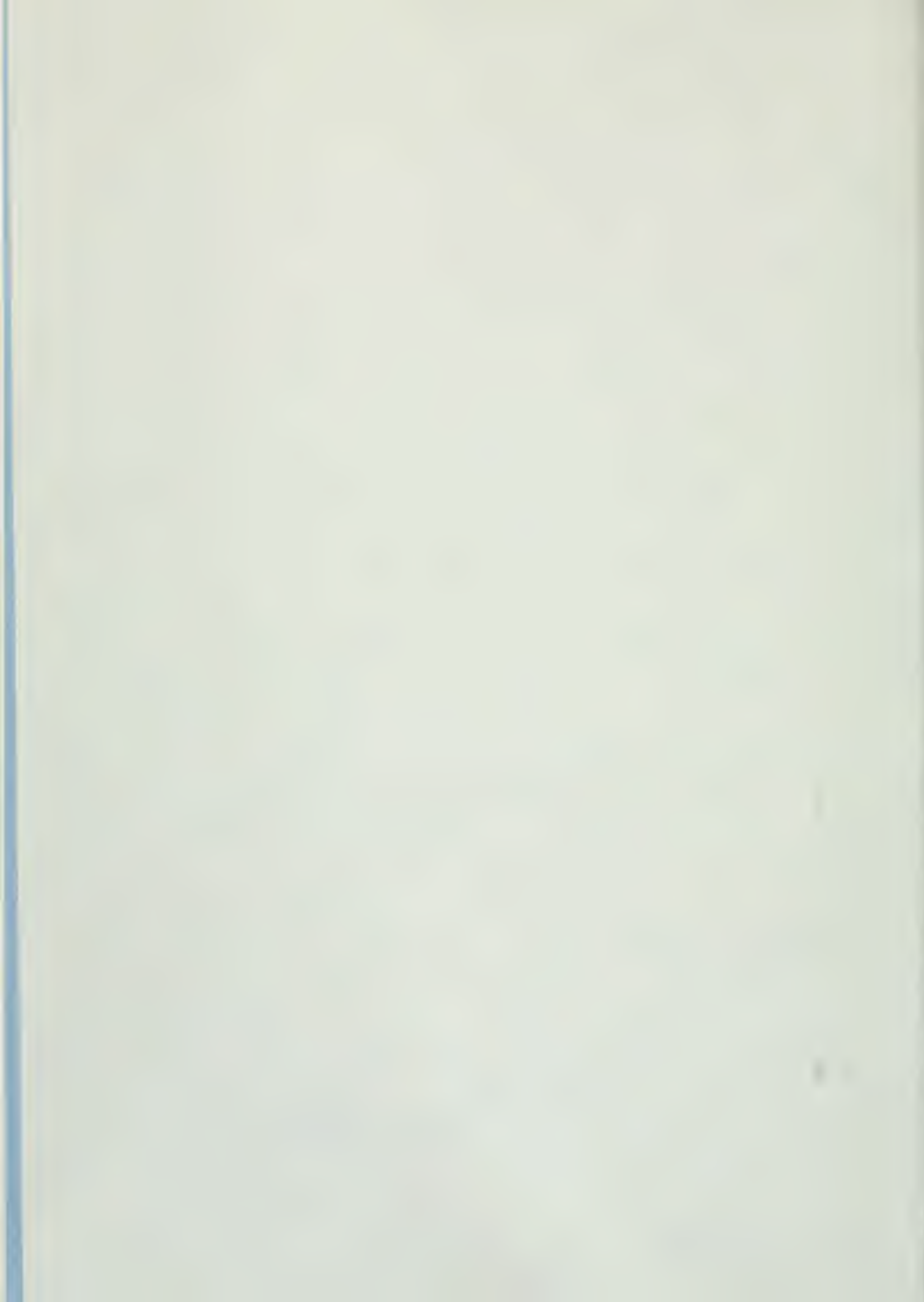
Appellee,

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FOR THE DISTRICT OF IDAHO

BRIEF FOR AMICUS CURIAE - STATE OF ARIZONA

STATE OF ARIZONA
Gary K. Nelson
The Attorney General

LEONARD M. BELL
Assistant Attorney General



THE STATEMENT OF POSITION OF
THE STATE OF ARIZONA

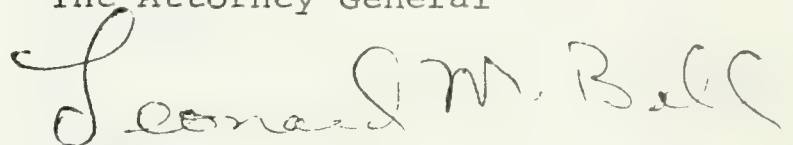
The State of Arizona files this amicus curiae brief pursuant to an invitation expressed in an Order of this Court dated May 8, 1969.

For its argument and conclusion, the State of Arizona concurs in the position taken by the amici curiae brief filed by the States of Idaho and Washington and hereby adopts that brief as its own.

Respectfully submitted,

STATE OF ARIZONA

GARY K. NELSON
The Attorney General

A handwritten signature in cursive script, reading "Leonard M. Bell".

LEONARD M. BELL
Assistant Attorney General
159 Capitol Building
Phoenix, Arizona 85007

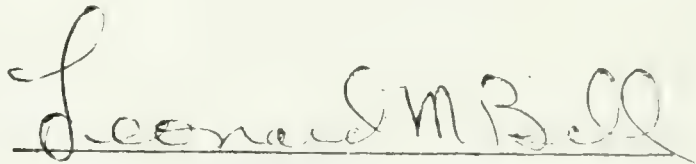
Attorneys for the
State of Arizona

CERTIFICATE OF MAILING

I hereby certify that I have on this 20th day of June, 1969, served the foregoing brief of Amicus Curiae upon the Appellant by placing two (2) true and correct copies of the same in the United States mail, postage prepaid, addressed to:

Mr. Clarence D. Suiter
Assistant United States Attorney
District of Idaho
550 West Fort Street
Boise, Idaho

ATTORNEY FOR APPELLANT

A handwritten signature in cursive script, reading "Leonard M. Bell", written over a horizontal line.

LEONARD M. BELL
Assistant Attorney General
STATE OF ARIZONA

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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- v -

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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ADDITIONAL AMICUS CURIAE BRIEF
STATE OF ARIZONA

FILED

JUL 19 1969

WM. B. LUCK, CLERK

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IN THE UNITED STATES COURT OF APPEALS

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NO. 22,708

UNITED STATES OF AMERICA,

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STADIUM APARTMENTS, INC., ET AL.

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STATE OF ARIZONA

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The Attorney General

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A.R.S.
§ 12-1282

THE STATEMENT OF POSITION OF
THE STATE OF ARIZONA

The State of Arizona files this additional amicus curiae brief pursuant to a letter from the Clerk of this Court dated June 26, 1969, allowing the filing of an additional brief on the merits until July 20, 1969. In this brief, the State of Arizona will not burden the Court with full legal argument on the merits, as the amicus curiae brief of the State of California has presented an exhaustive review of the law in this matter. Following is a short review of the Arizona statutory and case law providing for redemption following foreclosure of mortgages.

The Arizona Revised Statutes, as amended in 1963, provide in part:

"§ 12-1282. Time for redemption

"A. The judgment debtor or his successors in interest may redeem at any time within thirty days after the date of the sale if the court determined as part of the judgment under which the sale was made that the property was both abandoned and not used primarily for agricultural or grazing purposes.

"B. The judgment debtor or his successor in interest may redeem at any time within six months after the date of the sale except when the court has made the determinations as provided in subsection A. * * *

In Elson Development Co. v. Arizona Savings and Loan Association, 99 Ariz. 217, 407 P.2d 930 (1965) the Arizona Supreme

Court held that an agreement by the mortgagor to abandon the mortgaged premises if the said mortgagor did not perform certain obligations by a set date to be invalid and against public policy. In that opinion, the Arizona Supreme Court stated:

"In the instant case there was an effort to reduce the statutory redemption period by the agreement to abandon. Such agreements would mean that the redemption period would end at a time when the mortgagor might be least able to make redemption. The mortgagee could thereby secure title to the property by bidding less than the amount of the judgment, and less than the real value of the property, thereby defeating the purpose and intent of the provisions of the statutes providing for redemption periods.

"The intent and purpose of the statute providing for redemption cannot be violated by an agreement. The object of the redemption statute is to give to the mortgagor time to pay his obligation and avoid the loss of his property. . . ."

CONCLUSION

The inclusion of the Idaho period of redemption in the foreclosure decree should be affirmed as either a matter of law or as a matter of public policy if this Court is to adopt an applicable rule:

(1) For the reasons expressed in the amicus curiae brief of the State of California.

(2) For the reasons stated by the Arizona Supreme Court.

(3) For the reason that periods of redemption after mortgage foreclosures do not impair the investment security of mortgagees.

Respectfully submitted,

STATE OF ARIZONA

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Attorneys for the
STATE OF ARIZONA

No. 22733 ✓

IN THE

UNITED STATES COURT OF APPEALS

JUN 11 1969

FOR THE NINTH CIRCUIT

SYDNEY N. FLOERSHEIM, an individual
trading and doing business as
FLOERSHEIM SALES COMPANY and NATIONAL
RESEARCH COMPANY,

*All Vol.
3502*

Petitioner,

VS

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR REHEARING BY PETITIONER
AND REQUEST FOR HEARING EN BANC

JAMES A. SCHWARTZ
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Attorney for Petitioner

FILED

JUN 10 1969

WILLIAM A. LUCAS, CLERK

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No. 22733

IN THE
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FOR THE NINTH CIRCUIT

SYDNEY N. FLOERSHEIM, an individual
trading and doing business as
FLOERSHEIM SALES COMPANY and NATIONAL
RESEARCH COMPANY,

Petitioner,

vs

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR REHEARING BY PETITIONER AND
REQUEST FOR HEARING EN BANC

STATEMENT OF CASE

Petitioner has heretofore filed with the above
entitled court a Petition to Review an Order of the
Federal Trade Commission. The Order of the Federal Trade
Commission was affirmed on May 28, 1969.

GROUND FOR REHEARING

A rehearing should be granted herein and the decision
vacated for the following three (3) reasons:

I

The decision, insofar as it holds that there is
substantial evidence to support the Order of the Federal

Trade Commission, is contrary to the evidence.

II

The decision is contrary to law insofar as it holds that:

A. The Order of the Federal Trade Commission is not arbitrary, capricious, unreasonable and a denial of due process; and,

B. The Petitioner received adequate notice he was being charged with misrepresenting that a third party, other than the creditor, was interested in the debt.

III

Substantial legal issues raised by the Petitioner were not considered or were overlooked by the Court.

ARGUMENT

I

THE DECISION, INsofar AS IT HELD THAT THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE ORDER OF THE FEDERAL TRADE COMMISSION, IS CONTRARY TO THE EVIDENCE.

The decision, at pages 1-3, gives a physical description of the forms sold by the Petitioner. Then, commencing on Page 3, and continuing through Page 6, the decision summarizes or quotes from portions of the Opinion and Order of the Commission. The decision does not state, nor does it discuss, the testimony of witnesses at the hearing with respect to the effect of the forms upon persons receiving them and whether they were deceived or misled as to the true identity of sender, or their purpose. Yet,

the decision concludes, at page 6, that there is substantial evidence to support the conclusion of the Commission that the Petitioner's forms and envelopes "are misleading, create the impression that they come from the government or some other official source or third party, rather than from the creditor, and that they have the capacity to and tendency to deceive those to whom they are sent."

Forms, or any other type of documents, cannot be deceptive in the abstract. Unless some person is deceived, the forms are not deceptive. The testimony at the hearing was that in reality and in actual use the forms did not deceive. The finding of the Commission is thus erroneous in that there is no substantial evidence to support it.

Further, subparagraph 3c of the Commission's Order requires Petitioner to have printed on any envelope which uses a Washington D.C. return address the identity of the creditor. U. S. Postal Regulation 124.55 provides in pertinent part that any matter which has on its outside label or envelope "..... any language asking for payment of a bill which by its manner & style of display is defamatory and reflects injuriously on the character of the addressee." is libelous.

62 Stat 782, 18 U.S.C. 1718 provides in substance that any such libelous material will not be delivered and that deposit for mailing of such material is a crime.

Thus, if Petitioner takes an assignment of an obligation for collection, being properly licensed to do so, thereby becoming the creditor, the printing of his trade name alone, i.e., "Payment Demand, Inc." on his envelopes might well be considered a violation of the above cited Statute and Postal Regulation. In such a case, compliance with subparagraph 3c of the Order of the Commission might well deprive him of the use of the United States Mail service and subject him to criminal prosecution.

The Commission's Order would also deny the use of the mail and impose possible criminal prosecution on a customer of Petitioner who happened to be in the collection business and had a trade name descriptive of his type of business, such as, e.g., "Overdue Accounts Receivable Collections". This is unreasonable, arbitrary, capricious and a denial of due process of law. It is such because never has it been held that a creditor, himself, could not make every reasonable and lawful effort to collect money due him.

To place the Petitioner or his customers in a position where they are confronted with the alternatives of: 1) violating the Order of the Commission by omitting the name of the creditor; 2) violating the above cited Statute and Postal Regulation by using the name of the creditor and

facing the very real probability that the material will not be delivered and that they might be prosecuted criminally; or 3) not using the mail and thus being de facto put out of business, is certainly the rendering of an unreasonable, arbitrary and capricious order which deprives Petitioner and his customers of their property without due process of law.

II

THE DECISION IS CONTRARY TO LAW IN HOLDING THAT:

A. THE ORDER OF THE FEDERAL TRADE COMMISSION IS NOT ARBITRARY, CAPRICIOUS, UNREASONABLE AND A DENIAL OF DUE PROCESS:

As discussed above, the only possible evidence of some momentary deception, was testimony by witnesses which related only to the type of envelope used by the Petitioner. On the other hand, the Order of the Commission went far beyond dealing with the type of envelope used and thus goes far beyond, as the Court stated in its opinion, at page 6, imposing a "remedy.....reasonably calculated to end the deception." The Court implicitly recognized that the Order, at least to some degree was broader than necessary when it stated that the "fact that it may impose more control than essential is not fatal."

However, there is a line beyond which "more control than is essential" is no longer permissible, but is unreasonable, arbitrary and capricious. It is in light of the evidence as stated above, that Petitioner contends that

the Order has crossed that line and is unreasonable, arbitrary and capricious.

B. THE PETITIONER RECEIVED ADEQUATE NOTICE HE WAS BEING CHARGED WITH MISREPRESENTING THAT A THIRD PARTY, OTHER THAN THE CREDITOR, WAS INTERESTED IN THE DEBT.

The Court, in its opinion, stated at page 6, that "we have reviewed the complaint and the hearing and conclude that Petitioner had adequate notice of this charge". While it is true that the complaint could be interpreted to provide sufficient notice, the Court has ignored the fact that Petitioner was told expressly, by the Hearing Officer, that unless the Commission amended the complaint to state clearly a charge relating to alleged misrepresentations that a third party, other than the creditor, was interested in the debt, this charge would not be considered. (See Reporter's Transcript, page 36, lines 1-12). Petitioner was thus affirmatively led to believe that this charge was not in issue, yet, a great portion of the Commission's Order deals directly with the point. (See paragraph 1, 2a, 2c and 3b of the Decision). Unless Petitioner is given notice that he must defend against a charge, the portions of an Order sustaining that charge are void.

III

SUBSTANTIAL LEGAL ISSUES RAISED BY PETITIONER WERE NOT CONSIDERED OR WERE OVERLOOKED BY THE COURT.

Petitioner adopts by reference all of his arguments under Points I and II in support of his contention that

substantial legal issues raised by Petitioner were not considered or were overlooked by the Court.

REQUEST FOR HEARING EN BANC

Because of the importance of the decision to be reached in this case and the far reaching effect of the Commission's Order, it is respectfully requested and suggested that this case be heard en banc.

DATED: This 8th day of June, 1969.

Respectfully submitted,

JAMES A. SCHMIESING,

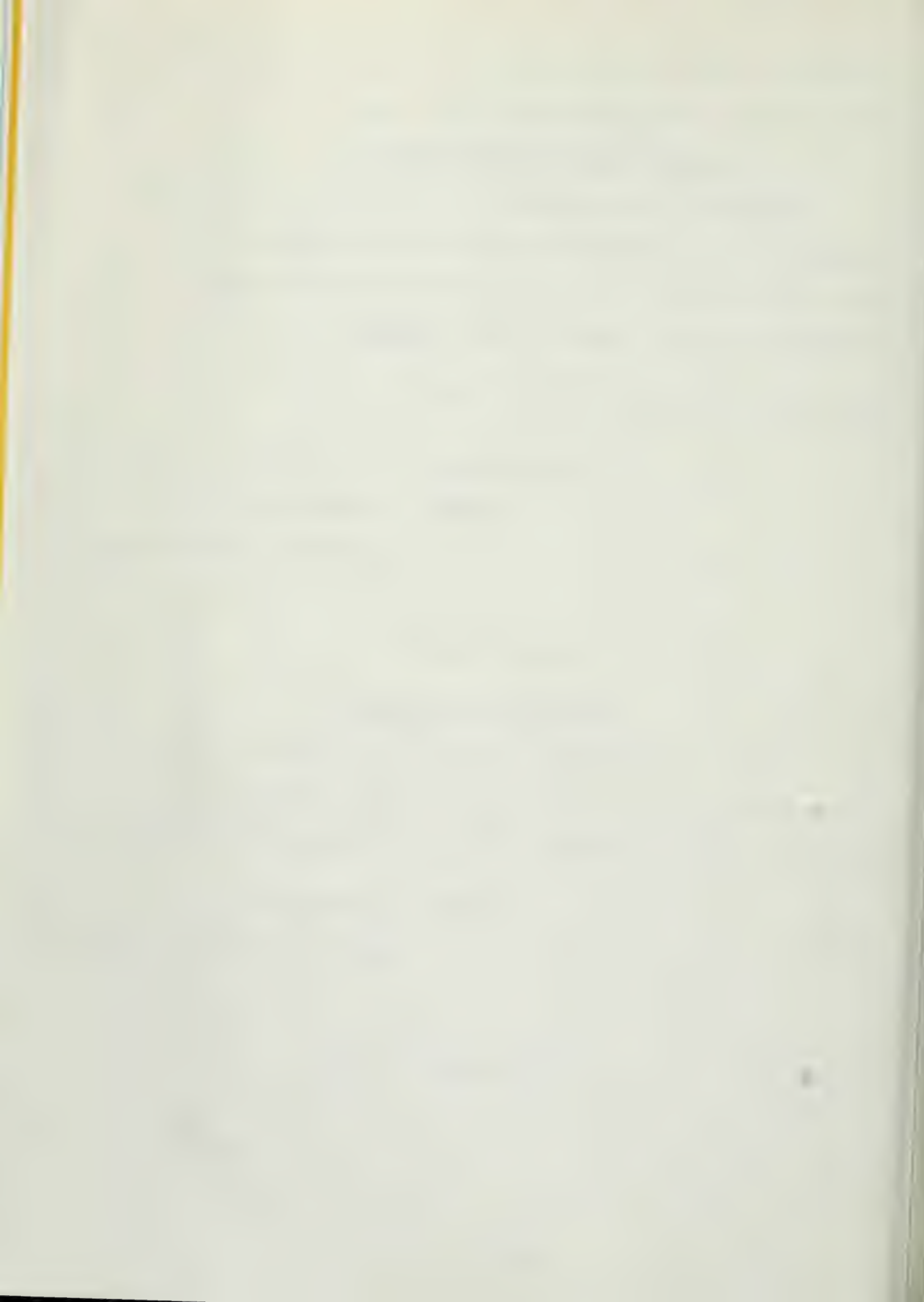
Attorney for Petitioner

CERTIFICATE OF COUNSEL

JAMES A. SCHMIESING, counsel for Petitioner, does hereby certify that in his judgment the Petition for Rehearing is well founded and is not interposed for delay.

JAMES A. SCHMIESING,

Attorney for Petitioner



AFFIDAVIT OF MAILING

STATE OF CALIFORNIA)
)
COUNTY OF ORANGE) ss

I, the undersigned, say:

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 833 Dover Drive - Suite 6, Newport Beach, California, 92660. On June 9, 1969, I served the within PETITION FOR REHEARING BY PETITIONER AND REQUEST FOR HEARING EN BANC, on the following in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Newport Beach, California, addressed as follows:

WILLIAM B. LUCK, Clerk
United States Court of Appeals - Ninth Circuit
7th and Mission Streets
P.O. Box 547
San Francisco, California 94101 (25 copies)

JAMES McI. HENDERSON, General Counsel
J. B. TRULY, Assistant General Counsel
ALVIN L. BERMAN, Attorney
FEDERAL TRADE COMMISSION
Washington, D.C. 20580 (3 copies)

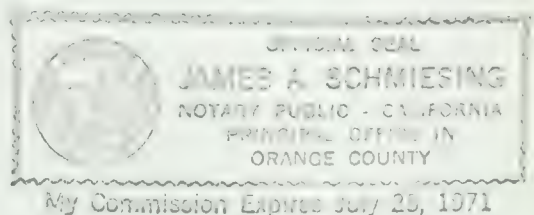
DATE: This 9th day of June, 1969.

Claudia D. King

Subscribed and sworn to before me
on this 9th day of June, 1969.

Notary Public in and for said
County and State

JAMES A. SCHMIESING



UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE E. WILSON, Warden,

Appellant,

vs.

VERON ATCHLEY,

Appellee.

No. 22735

APPELLANT'S PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC.

THOMAS C. LYNCH, Attorney General
of the State of California

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FILED

JUN 10 1969



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- 28 United States Code
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE E. WILSON, Warden,

Appellant,

vs.

VERON ATCHLEY,

Appellee.

No. 22735

APPELLANT'S PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC.

To the Honorable STANLEY N. BARNES, FREDERICK G. HAMLEY,
and JAMES R. BROWNING, Circuit Judges:

COMES NOW, APPELLANT, LAWRENCE E. WILSON, of the
Department of Corrections of the State of California, and
pursuant to Rules 35 and 40 of the Federal Rules of Appel-
late Procedure and Rule 10 of the Rules of the United States
Court of Appeals for the Ninth Circuit, respectfully request
a rehearing of this court's decision of May 27, 1969, in
the above-entitled proceedings which was a review of an
order of the United States District Court for the Northern
District of California, granting a state prisoner's petition
for a writ of habeas corpus. As grounds for rehearing,
appellee respectfully represents:

1. The district court erroneously concluded that
petitioner had rebutted the presumed validity of the

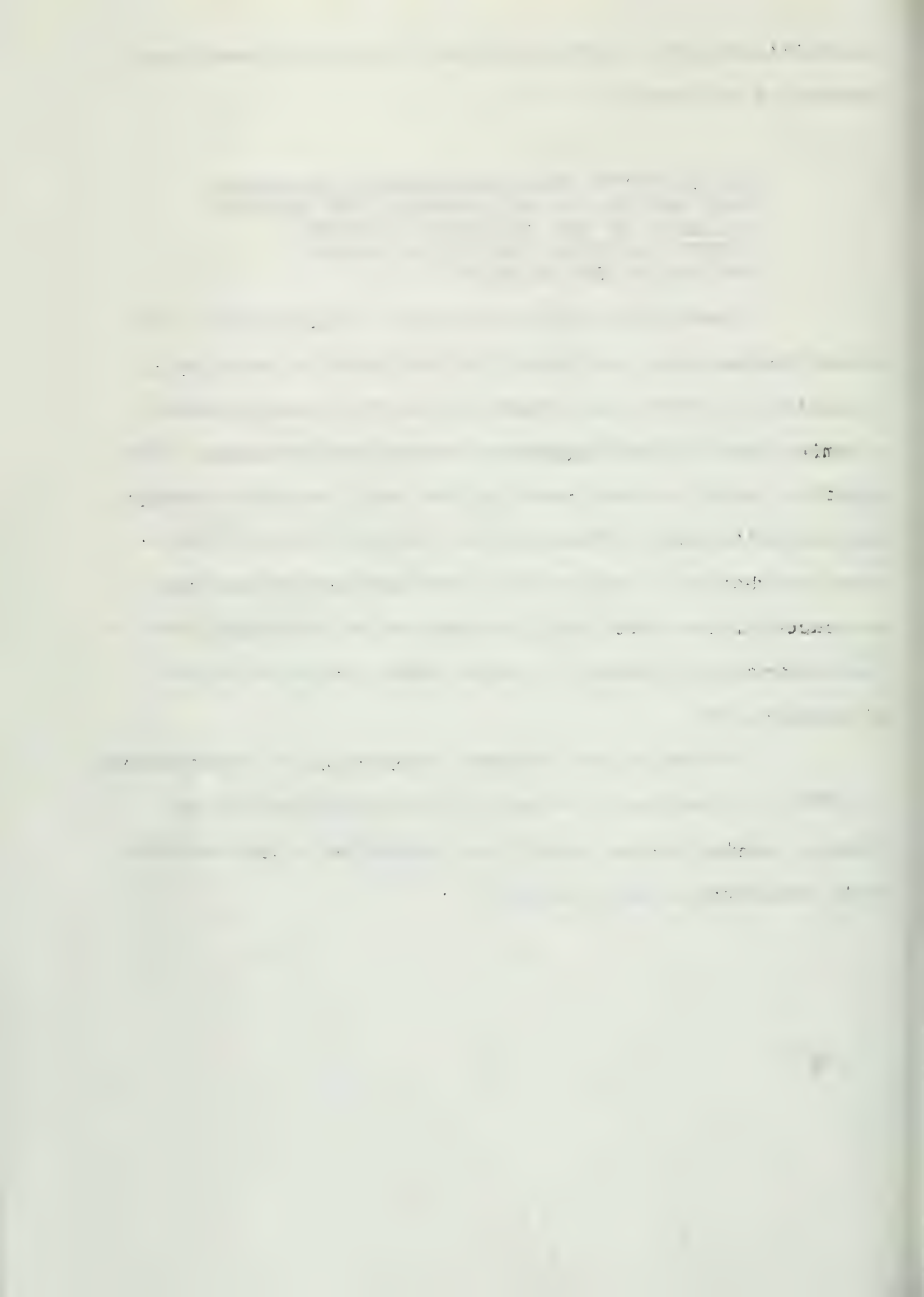
California Supreme Court's opinion that his statement was admissible at trial.

I

THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT PETITIONER HAD REBUTTED THE PRESUMED VALIDITY OF THE CALIFORNIA SUPREME COURT'S OPINION THAT HIS STATEMENT WAS ADMISSIBLE AT TRIAL.

According to Title 28 U.S.C. section 2254, the burden rested upon petitioner in the district court to establish by convincing evidence that the factual determination made by the California courts was erroneous. The district court's order granting the writ, and this court's per curiam opinion affirming that order, fail to state upon what facts it can be concluded that petitioner has successfully rebutted this presumption of validity. See the dissenting opinion of Justin Barnes attached hereto as Appendix "A".

In view of the extreme importance the application of 28 U.S.C. section 2254 has to the administration of federal habeas corpus relief, we respectfully request that this rehearing be held en banc.



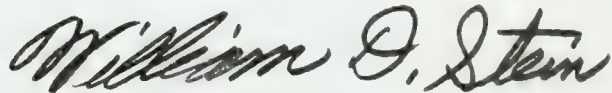
CONCLUSION

Appellant respectfully requests this rehearing and suggests that the rehearing be held en banc in view of the district court's opinion that the California Supreme Court's decision in this case is not entitled to the presumption of validity contained in 28 U.S.C. section 2254.

Dated: June 10, 1969

THOMAS C. LYNCH, Attorney General
of the State of California

JOHN T. MURPHY
Deputy Attorney General



WILLIAM D. STEIN
Deputy Attorney General

Attorneys for Appellant

WDS:ml

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APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

LAWRENCE E. WILSON, Warden,

Appellant,

VS.

VERON ATCHLEY,

Appellee.

No. 22,735

[May 27, 1969]

Appeal from the United States District Court
for the Northern District of California

Before: BARNES, HAMLEY, and BROWNING,
Circuit Judges

PER CURIAM:

The judgment is affirmed for the reasons stated in the district court's opinion, F.Supp. (N.D. Calif. 1968).

BARNES, Circuit Judge, dissenting:

Appellant was a petitioning state prisoner in the court below. He had been convicted of first degree murder and sentenced to death. The California Supreme Court affirmed the conviction and sentence. (53 Cal.2d 160, 346 P.2d 764 (1959).) Certiorari to the Supreme Court of the United States was granted, and then dismissed as improvidently granted. (366 U.S. 207 (1961).) Appellant's sentence was later commuted to life imprisonment without possibility of parole in 1961, and was further commuted to allow parole in 1966. Appellant petitioned the United States courts for a writ of habeas corpus. This was denied, without a hearing, and the denial affirmed upon the ground there was no lack of due process. *Atchley v. Dickson*, 338 F.2d 1014 (9th Cir. 1964).

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This is an appeal, therefore, from a second petition for a writ of habeas corpus based on the claim (1) petitioner's confession was improperly admitted into evidence; (2) the trial court erroneously excluded evidence as to petitioner's mental condition; (3) that no hearing was held outside the jury's presence to determine the admissibility of petitioner's extra-judicial statement.

The Supreme Court of California specifically recognized the general rule of the inadmissibility of confessions, or any statement made by the accused relative to the offense charged, if made involuntarily. It passed upon the admission of appellant's "implicating statement" by stating:

"The People contend, however, that the voluntary nature of defendant's statements was adequately shown before the recording was admitted into evidence. Travers testified that no threats were made, that no inducements were offered, and that in an earlier conversation defendant had volunteered substantially the same statements without being asked. Defendant at no time contradicted this testimony or suggested that any of his recorded statements were untrue. Moreover, the recorded conversation demonstrates that Travers referred to the insurance policy to explain why he was asking questions and not as an inducement for any particular answers. The trial court listened to the tape in chambers before ruling on its admissibility. There is therefore no merit in defendant's contention that the recording was admitted without a proper showing that his statements were made voluntarily.

"Defendant also contends that the recording was obtained by such fraud that its use as evidence was inconsistent with due process. He relies primarily on *Leyra v. Denno*, 347 U.S. 556 [74 S.Ct. 716, 98 L.Ed 948]. In that case the police, having promised a suspect medical treatment for an acutely painful attack of sinus, introduced as the 'doctor' a highly skilled psychiatrist with a considerable knowledge of hypnosis. The psychiatrist used threats, promises of leniency, and expressions of sympathy to reduce the physically exhausted suspect to almost trance-like submission. Use of his resulting confessions violated due process, largely because they were the product of 'mental coercion.' [footnote omitted] Although there was a similar deception in the

present case, there was no comparable mental coercion. The deception itself does not render defendant's statements inadmissible, for it was not a type reasonably likely to procure an untrue statement. (*People v. Connelly*, 195 Cal. 584, 597, [234 P. 374]; *People v. Castello*, 194 Cal. 595, 602 [229 P. 855].)" 52 Cal.2d 160 at 170-171.

Thus we see there was an in-chambers hearing of the tape recording, outside the presence of the jury, prior to any ruling by the state trial judge on admissibility.

Likewise, the California Supreme Court had before it, and considered, the second error listed above—the exclusion of medical testimony as to defendant's mental condition at the time of the shooting. The court concluded this was not error because never offered or raised below. *Id.*, p. 176, Key ¶ 20. The harmless error found by the Supreme Court of California in the exclusion of certain expert opinion testimony was with respect to defendant's reflexes and memory, not to the accuser's mental condition at the time of the shooting.

The California Supreme Court also found there was "substantial and uncontradicted evidence that no coercion occurred." *Id.*, p. 171.

I turn to 28 U.S.C. § 2254. Keeping in mind the findings of the California Supreme Court, I must ask, was this "a determination after a hearing on the merits of a factual issue"? I think it was. It was "made by a state court of competent jurisdiction." This was "in a proceeding in which [this] applicant for the writ and the state or an officer or agency thereof were parties." It was made in a "written opinion." It must therefore "be presumed to be correct" unless the applicant can bring himself within any one of the exclusions of 28 U.S.C. § 2254, numbered 1 to 8.

In considering these exclusions (there being no admissions by the respondent state) the burden is on the applicant to establish the exception.

With this in mind I turn to the district court findings in this case. It first determined that it was presently unable "to say that the confession was involuntary." (C.T. 73.) If the court was unable to do so, then, if I read § 2254 correctly, the applicant has not met the burden of proof required by that section.

The district court said that the state trial court did not "reliably" determine whether Atchley's confession was voluntary or involuntary, following the language of *Jackson v. Denno*, 378 U.S. 368, 391 (1964). As pointed out above, the Supreme Court of California referred to the "proper showing" made in the trial court "that his statements were made voluntarily."

It seems improper to me for a federal court, ten years after the event, after examining a record from which it cannot conclude the confession was involuntary, and without pointing out (except for general and conclusionary language) any evidence of convincing force that the confession was an involuntary act—to require an evidentiary hearing in the state courts.

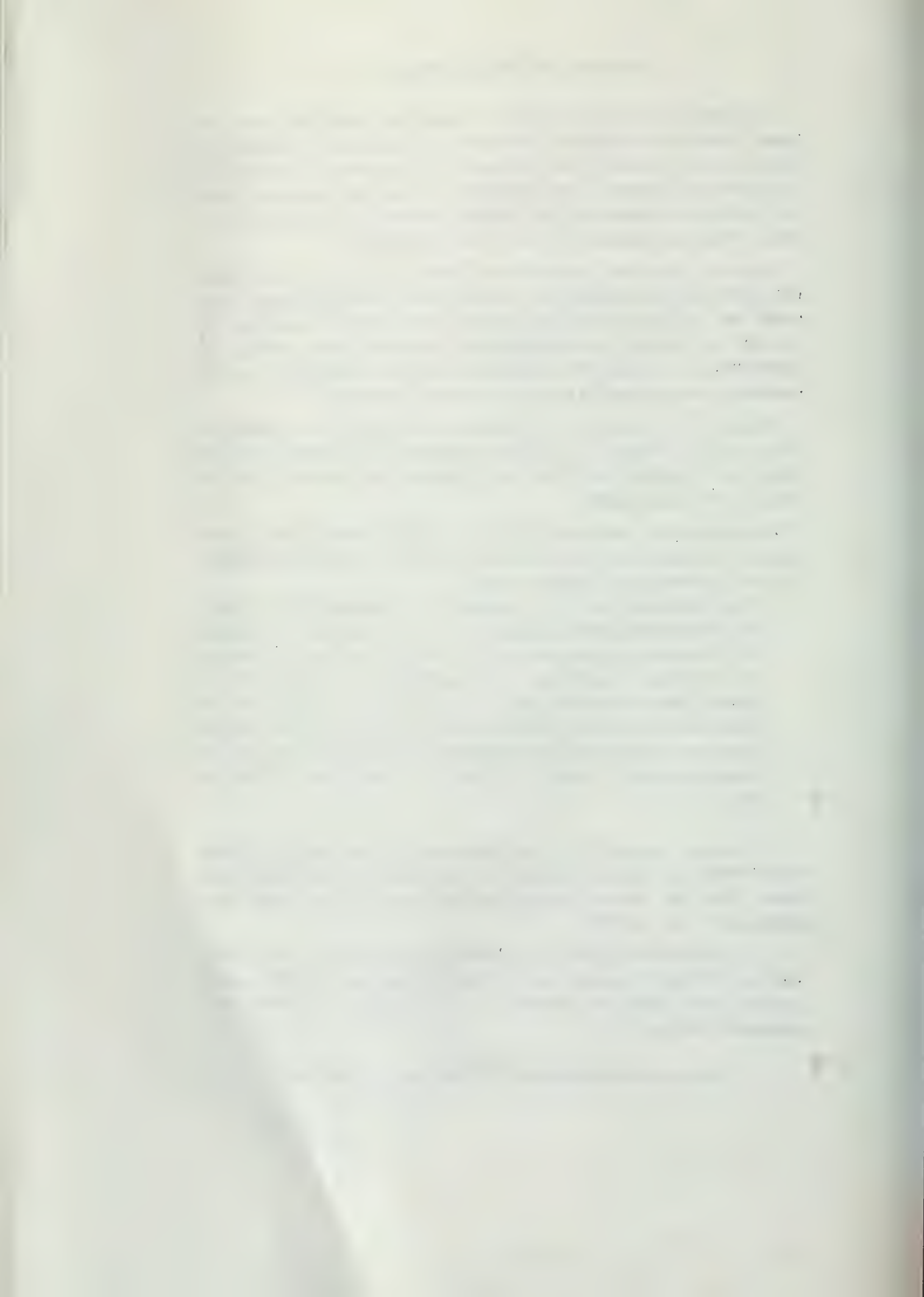
Without any recital of a factual showing by the petitioner that he falls within the § 2254 exceptions, the purpose of the "showing required to offset the presumption created by the statute," is meaningless.

The legislative history of 28 U.S.C. § 2254 shows that it was passed "to prevent the abuse of the writ of habeas corpus" by state prisoners in federal courts.

"Such purposes are to be attained by provisions for a qualified application of the doctrine of *res adjudicata* in Federal Court habeas corpus proceedings brought by State prisoners by provisions according a presumption of correctness to factual determinations made at a hearing on the merits by State courts and by provisions with respect to the burden of proof in Federal court proceedings for habeas corpus by State prisoners." 1966 U. S. Cong. & Adm. News, p. 3663 at 3666.

The statute adopted by the Congress in 1966 says it places "the burden on him [petitioner] to establish by convincing evidence that the factual determination by the State court was erroneous." *Id.*, p. 3667.

I do not think that here it can fairly be stated that such "convincing evidence," existed, and I would reverse the district court's decision, and deny the petition, in an attempt to follow congressional dictates.



No. 22802

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE SIXTY TRUST,

Appellant,

vs.

WM. B. ENRIGHT, TRUSTEE, ETC.,

Appellee.

OPENING BRIEF FOR APPELLANT.

DEAN C. DUNLAVEY,
CHARLES R. COLLINS,
MARSHA K. McLEAN,
GIBSON, DUNN & CRUTCHER,

634 South Spring Street,
Los Angeles, Calif. 90014,

Attorneys for Appellant.

FILED

JUL 26 1968

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List of Abbreviations.

P.	Petition
A.	Answer to Petition for Reorganization
R.	Transcript of Record
AR.	Additional Transcript of Record
V. I	Volume I of Transcript of Proceedings held on June 28, 1967
V. II	Volume II of Transcript of Proceedings held on June 30, 1967
V. III	Volume III of Transcript of Proceedings held on June 30, 1967
Tr.	Transcript of Proceedings held on September 21, 1967
Ex.	Exhibits to hearing held on June 28, 1967 and June 30, 1967

No. 22802

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE SIXTY TRUST,

Appellant,

vs.

WM. B. ENRIGHT, TRUSTEE, ETC.,

Appellee.

OPENING BRIEF FOR APPELLANT.

Statement of Jurisdiction.

The jurisdiction of the District Court was predicated upon Title 11 U.S.C. §§ 46, 502, 511 and 528, the action being one for corporate reorganization pursuant to the provisions of Chapter X of the Bankruptcy Act (Title 11 U.S.C. §§ 501-676).

University City, a California corporation [P. 1; R. 2], filed a Petition [R. 2] on April 25, 1967, seeking corporate reorganization, alleging that for six months prior to the filing of the Petition, it had maintained its principal place of business within the territorial jurisdiction of the Southern District Court [P. 1; R. 2]; that its business was the operation and development of real estate [P. 1; R. 2]; that its principal assets consisted of land [P. 2; R. 3]; that its principal liabilities consisted of various promissory notes secured by deeds of trust on said real property [P. 2; R. 3];

that it was unable to meet its debts as they mature [P. 3; R. 4]; that the value of its assets exceeded its total liabilities [P. 2; R. 3]; and that relief could not be obtained under Chapter XI of the Bankruptcy Act because no reorganization could be achieved without a reduction, extension or other satisfactory adjustment of at least some of its secured indebtedness [P. 4; R. 3].

After the District Court issued its initial Order Approving Petition, and Appointing Trustee, Order of Reference and Restraining Order [R. 23-28] and an Amendment thereto [R. 29], The Sixty Trust, a secured creditor of University City [A. 1-2; R. 37-38], filed its Answer to Petition for Reorganization [R. 37] pursuant to Section 137 of the Bankruptcy Act (Title 11 U.S.C. § 537), seeking a dismissal of the Petition as not having been filed in good faith (Title 11 U.S.C. § 546) on the ground, among others, that real property owned individually by certain shareholders, officers and directors of University City and encumbered by deeds of trust in favor of The Sixty Trust had been transferred to University City immediately prior to the filing of the Petition for the sole purpose of bringing said property within the injunctive power of the District Court so as to hinder, delay and prevent The Sixty Trust from proceeding with a foreclosure sale set for April 25, 1967, the date upon which University City filed its Petition [A. 4-5; R. 40-41].

After a two-day hearing on the issues raised by said Answer before the Referee in Bankruptcy pursuant to Section 144 of the Bankruptcy Act (Title 11 U.S.C. § 544) and the lodging of the Proposed Report, the Proposed Findings of Fact and Proposed Conclusions of Law by the Referee [R. 57-61] and the filing of

Objections thereto by The Sixty Trust [R. 62-75], the Referee, on August 16, 1967, filed the Report of Referee and Special Master [R. 76-77], Findings of Fact and Conclusions of Law of Referee and Special Master [R. 78-81] concluding, among other things, that the last-minute transfer of the real property to University City by its shareholders, officers and directors had not been fraudulent as to any creditor [R. 77], that the Petition had been filed in good faith and should be approved [R. 80], and that the request for a dismissal by The Sixty Trust should be denied [R. 80-81]. Thereafter, The Sixty Trust filed its Objections to Report of Special Master, Findings of Fact and Conclusions of Law Upon Contested Petition Under Chapter X [R. 84-96], and oral argument on the said Report, Findings and Conclusions and Objections thereto subsequently was presented to the District Court. Following the filing by The Sixty Trust of Supplementary Objections to Report of Special Master, Findings of Fact and Conclusions of Law Upon Contested Petition Under Chapter X on September 27, 1967 [R. 97-100], the District Court, on October 3, 1967, issued its Order Confirming Referee and Special Master's Report, Findings and Conclusions of Law and Approving Petition Pursuant to Section 144 [R. 102]. Thereafter, following execution by the parties of a Stipulation Re Order to the effect that the Order Confirming Referee and Special Master's Report, Findings, and Conclusions of Law and Approving Petition Pursuant to Section 144 involved more than \$500.00 and the approval of same by the District Court on October 27, 1967 [R. 105-106], The Sixty Trust, on October 26, 1967, duly filed a Notice of Appeal to the Court of Appeal Under Fed. Rules of Civ. Proc. Rule 73(d) from said Order [R. 107-108].

The jurisdiction of this Court on appeal to review the Order of the District Court is premised upon Title 11 U.S.C. §§ 47, 48 and 521.

Statement of the Case.

This is an appeal by the Trustees of The Sixty Trust (hereinafter "The Sixty Trust"), a secured creditor of University City [R. 35-36, 37-40] from the Order of the District Court [R. 102] approving the Petition for corporate reorganization under Chapter X of the Bankruptcy Act (Title 11 U.S.C. §§ 501-676) filed by University City, a California corporation, the debtor herein [P. 1; R. 2].

The filing of the said Petition represented the latest step (to that time) in a long history of actions taken by University City to stave off its creditors, secured and unsecured, in an attempt to avoid the inevitable consequences of its financial impotency. Its precarious financial condition, as demonstrated by the financial statement attached as Exhibit "A" to the Petition [R. 7-21] is not of recent origin. In fact, the pattern of University City since its incorporation in 1959 has been one of a continual, pressing, seemingly insatiable, need for operating funds leading to frequent financings. University City, on three separate occasions during the period 1962 through 1964, obtained three loans from The Sixty Trust alone in the total aggregate amount of \$10,750,000.00 [V. I, 44:26-45:5; V. I, 52:6-12 and V. I, 59:11-18] secured by deeds of trust upon substantially all of the real property owned by University City. At the time of the filing of the Petition, University City remained indebted to The Sixty Trust in an amount in excess of \$10,390,000.00 [A. 3; R. 39]

and ninety-nine percent of University City's principal, if not sole, asset—land held for development and sale—was encumbered by deeds of trust in favor of The Sixty Trust [A. 3; R. 39].

University City has been in continual default to The Sixty Trust under its promissory notes and the deeds of trust securing the same since June 18, 1965; Notices of Default were filed by The Sixty Trust in January, 1966 [Exs. L and M]. In addition, University City was in default under promissory notes and deeds of trust originally executed in favor of Pacific Finance Corporation and assigned by the latter for valuable consideration to The Sixty Trust [A. 2; R. 38]. A Trustee's foreclosure sale under one of said deeds of trust was scheduled for April 25, 1967 [A. 2; R. 38], the date of the filing of the Petition, but was stayed and restrained by Order of the District Court [R. 27-28].

In addition, deeds of trust were held by The Sixty Trust encumbering approximately 900 acres of real property (hereinafter the Sorrento Property) owned by Carlos Tavares and Irvin J. Kahn [Ex. J], officers, shareholders and directors of University City [V. I, 19:16; V. I, 43:25-44:7]. The notes they secured were in default and Notices of Default and Election to Sell had been duly filed. Five days prior to the filing of the Petition for Reorganization by University City on April 25, 1967, Carlos Tavares and Irvin J. Kahn, by grant deeds dated April 20, 1967, transferred the Sorrento Property to University City [Ex. K]. At the time of the filing of the Petition herein, University City held the Sorrento Property as an asset [R. 21]. By virtue of the automatic stay order, The Sixty

Trust was enjoined from foreclosing its deeds of trust encumbering the Sorrento Property [R. 27-28; Title 11 U.S.C. § 548].

Subsequent to the filing of the Petition, The Sixty Trust, pursuant to Section 137 of the Bankruptcy Act (Title 11 U.S.C. § 537), filed an Answer to the Petition seeking a dismissal of the action asserting, among other grounds, that the transfer of the Sorrento Property by Kahn and Tavares to University City on the eve of filing the Petition, for the admitted sole purpose of bringing said Sorrento Property within the injunctive power of the Court so as to restrain, hinder, delay and prevent The Sixty Trust from proceeding with a foreclosure sale under a certain deed of trust encumbering said Sorrento Property, demonstrated that the Petition had not been filed in good faith [A. 4-5; R. 40-41].

After a hearing before the Referee and Special Master on the issues raised by said Answer, the Referee issued a Report [R. 76-77], made Findings of Fact and Conclusions of Law [R. 78-81], which included holdings to the effect that the Petition had been filed in good faith [R. 80] and that the transfer of the Sorrento Property to the debtor did not result in a fraud upon any creditor [R. 77], and which were confirmed, approved and adopted by the District Court by its order entered October 3, 1967 [R. 102].

Questions for Decision by This Court.

The sole issues before this Court are whether two individuals may segregate a portion of their individually owned property, transfer that property to a controlled corporation, and then cause that corporation to file a Reorganization Petition so as to bring said prop-

erty within the automatic injunctive power of the District Court and thus protect their individual equity in said property from foreclosure by the holder of deeds of trust encumbering said property; whether such a transfer on the eve of filing of the Reorganization Petition shows such a total absence of good faith as to taint the entire proceeding requiring a dismissal of the Petition; and whether such a transfer shows a sufficient lack of good faith to require, at the very minimum, the exclusion of the transferred property from the reorganization proceeding and the vacating of the restraining order relative to said property.

Specification of Errors Relied Upon.

1. The District Court erred in confirming and approving the Referee and Special Master's Report.

2. The District Court erred in approving the Report of the Referee to the effect that the transfer by certain shareholders of University City of the 900 acres of Sorrento Property to the debtor on the eve of filing the Petition was not a fraud on any creditor.

3. The District Court erred in adopting the Findings of Fact and Conclusions of Law of the Referee and Special Master's Report.

4. The District Court erred in adopting the finding of the Referee to the effect that the debtor's Petition was filed in good faith as required by Section 144 of the Bankruptcy Act.

5. The District Court erred in adopting the conclusion of law of the Referee to the effect that the debtor's Petition satisfactorily complies with the requirements of Chapter X of the Bankruptcy Act.

6. The District Court erred in adopting the conclusion of law of the Referee to the effect that the Petition was filed in good faith and should be approved.

7. The District Court erred in adopting the conclusion of law of the Referee to the effect that the debtor is entitled to relief under Chapter X of the Bankruptcy Act.

8. The District Court erred in adopting the conclusion of law of the Referee to the effect that The Sixty Trust is not entitled to have the Petition dismissed and that their prayer for dismissal should be denied.

9. The District Court erred in adopting the conclusion of law of the Referee to the effect that the Petition in Chapter X of the debtor should be approved and that The Sixty Trust's prayer for dismissal of said Petition should be denied.

10. The District Court erred in approving the Petition of the debtor for relief under Chapter X of the Bankruptcy Act.

Summary of Argument.

On the question of good faith, The Sixty Trust contends that the District Court erred in approving and adopting the Referee's Report to the effect that the transfer of the Sorrento Property to University City (on the eve of filing of the Petition herein) by two of its principal shareholders, officers and directors did not result in a fraud upon any creditor.

Carlos Tavares, the president of University City, and the sole witness called by the debtor at the hearing to sustain its burden of establishing good faith, admitted that the sole purpose of the transfer was to protect the

individual equity held by Tavares and Kahn in said Sorrento Property from foreclosure by The Sixty Trust.¹ The evidence presented at the hearing on this issue compelled but one conclusion—that said transfer was an attempt by Tavares and Kahn to segregate a *portion* of their total personal assets so as to bring them within the injunctive powers of the District Court—protection that would not otherwise be available. Had Kahn and Tavares filed individual bankruptcy proceedings, *all* of their assets would have been submitted to the jurisdiction of the court and would have been available to the creditors for satisfaction of claims. The transfer by Tavares and Kahn to University City of only the portion of their assets subject to deeds of trust held by The Sixty Trust, for the purpose of preventing foreclosure sales demonstrates a complete lack of good faith and constitutes a fraud upon The Sixty Trust. The District Court's sanction of this transfer is clearly erroneous.

The District Court Erred in Approving, Adopting and Confirming the Report of the Referee to the Effect That the Transfer of the Sorrento Property on the Eve of Filing the Petition Did Not Result in a Fraud Upon Any Creditor.

Carlos Tavares, the president of University City since its incorporation and a director and a principal shareholder [V. I; 19:9-20; V. I; 21:3-5; V. I; 43:25-44:18], testified that, although University City was a record owner of 2,400 acres of land on the date the

¹“Q. And why was it you deeded that particular property to University City?

“A. Well, we deeded it to University City because we wanted to protect our interest in the land that was being foreclosed by Sixty Trust.” [V. I, 31:20-24].

Petition was filed [V. I; 20:18-21], approximately 900 of those acres (the Sorrento Property) had been transferred to University City immediately prior to the filing of the Petition [V. I; 28:9-13; Ex. K]. The testimony established that until December 30, 1966, these 900 acres of property had been owned by Sorrento Properties, Inc., a California corporation, owned by Tavares and Irvin Kahn [V. I; 30:26-31:4]. Sorrento Properties, Inc. was dissolved in December, 1966 [V. I; 30:16-19; Exs. F, G, and I], and all of its assets, including the 900 acres referred to herein as the Sorrento Property, were transferred to Tavares and Kahn, individually [V. I; 31:5-15; Exs. I and J]. The Sorrento Property was held by Tavares and Kahn individually until they transferred it to University City a few days prior to the filing of the Petition by grant deeds dated April 20, 1967 [V. I; 31:16-19; Ex. K]. At the time of the transfer by Kahn and Tavares of the Sorrento Property to University City, ninety-nine percent of said property was subject to deeds of trust in favor of The Sixty Trust [V. I; 24:12-23 and 31:25-32:6] and a Notice of Default and Election to Sell under said deeds of trust had been published by The Sixty Trust [V. I; 32:7-9].

The timing of the transfer by Tavares and Kahn to University City and the filing of the Petition by University City leads inescapably to the conclusion that said transfer was accomplished solely for the purpose of bringing said property within the injunctive jurisdiction of the Court so as to protect the individual equity of Kahn and Tavares in said property.

It is not necessary to rely upon an inference in the instant case—however compelling that inference may be—

since one of the principals involved, namely Tavares, admitted under oath that he and Kahn “deeded [the Sorrento Property] to University City because [they] wanted to protect [their] interest in the land that was being foreclosed by Sixty Trust” [V. I; 31:22-24]. The Board of Directors of University City had full knowledge of the purpose of the transfer [Ex. D].

The foregoing evidence supports but one finding, namely that the transfer by Tavares and Kahn of the Sorrento Property to University City was accomplished for the sole purpose of bringing the Sorrento Property within the injunctive powers of the District Court and was intended to hinder, delay and prevent The Sixty Trust from proceeding with the noticed foreclosure sale and that such purpose was known to and acquiesced in by the Board of Directors of University City.

Bankruptcy Courts have consistently refused to sanction such transfers and have refused to maintain continuing jurisdiction of such schemes.

In *Milwaukee Postal Building Corp. v. McCann* (8th Cir. 1938), 95 F. 2d 948, a corporation issued bonds secured by a deed of trust upon certain property owned by said corporation. Subsequently, the real property encumbered by said deed of trust was transferred to an individual who held title subject to the deed of trust securing the bonded indebtedness. Defaults under the terms of the bonds occurred. After an unsuccessful attempt to resolve his difficulties with the bondholders, the individual owner of the real property formed a corporation, transferred all of his right, title and interest in said real property to the newly formed corporation, and caused said corporation to file a petition for re-

organization under the then applicable Section 77(b) of the Bankruptcy Act.

The Circuit Court of Appeals, in affirming the lower court's dismissal of the petition, held that Section 77(b):

"[I]s confined to instances where the debtor is a corporation. It has nothing to do with the situation where the debtor is an individual or a partnership—sections 74 and 75, as amended, U.S.C.A. Title 11, §§ 202 and 203, cover the field as to individuals in so far as Congress deemed it wise so to do. It deals solely with corporate reorganizations. This being true, *it is clear that it would be not only a legal fraud upon creditors, but without the intendment of this section to construe as within the section a corporation formed to and taking over the property of an individual debtor for the purpose of utilizing the section.* * * *" (Emphasis added).

Milwaukee Postal Building Corp. v. McCann, 95 F. 2d 948, 950.

The Court further emphasized that:

" 'There is a duty in the courts to see that provisions of the act are not abused and that its privileges are extended only to those who are within the contemplation of the act.' "

Milwaukee Postal Building Corp. v. McCann, 95 F. 2d 948, 950.

The holding of the *Milwaukee* case is persuasive, if not compelling, authority for the proposition that the transfer of the Sorrento Property by Kahn and Tavares to University City a few days prior to the filing of the

Petition constituted grounds for dismissal of the Petition.

The fact that title to the Sorrento Property was held by a corporation prior to its transfer to Tavares and Kahn affords no distinguishing feature since the identical situation was likewise present in the *Milwaukee* case.

So too, in *In re North Kenmore Building Corp.* (7th Cir. 1936), 81 F. 2d 656, the Circuit Court reversed the District Court's denial of the motion to dismiss, concluding that the creation of a corporation by an individual in order to obtain greater protections for his individual assets constituted the type of scheme which could not be countenanced by a Court since the law was not intended to allow individuals to:

“[C]lothe themselves in corporate garments for the purpose of taking advantage of the statutes appertaining thereto if, in financial extremis, the law respecting corporations seemed to afford greater advantages. * * *”

In re North Kenmore Building Corp., 81 F. 2d 656, 657.

Nor is it necessary that the transfer be fraudulent as to the secured creditors; it is sufficient if its effect and purpose is to hinder and delay said creditors from enforcing their liens. Thus, in *Shapiro v. Wilgus* (1932), 287 U.S. 348, 77 L. Ed. 355, the United States Supreme Court, in an opinion by Justice Cardozo, held that a conveyance of all of an individual's property to a corporation could not be sustained even if the debtor's aim had been to prevent the disruption of his

business by creditors and to cause all of his assets to be protected for the benefit of all concerned.

The Court found that:

"[T]he sole purpose of the conveyance was to divest the debtor of his title and put it in such a form and place that levies would be averted. * * *"

Shapiro v. Wilgus, 287 U.S. 348, 353-354, 77 L. Ed. 355, 358.

As such it could not be sanctioned because:

"A conveyance is illegal if made with an intent to defraud the creditors of the grantor, but equally it is illegal if made with an intent to hinder and delay them."

Shapiro v. Wilgus, 287 U.S. 348, 354, 77 L. Ed. 355, 358.

See also:

Mongiello Bros. Coal Corp. v. Houghtaling Properties, Inc. (5th Cir. 1962), 309 F. 2d 925;
Sherman v. Collins (8th Cir. 1934), 75 F. 2d 62;
In re Cosgrave (S.D. Cal. 1935), 10 F. Supp. 672.

The intent and effect of the transfer by Kahn and Tavares to University City is factually indistinguishable from the intent and effect of similar schemes condemned in the foregoing cited authorities; the fact that Kahn and Tavares were not required to form a new corporation because of their control of an existing corporation is of no moment. The determining factor is that rather than each filing an individual bankruptcy proceeding and making all of their assets subject to creditor's claims, Kahn and Tavares segregated only a

portion of their holdings, namely the Sorrento Property, and transferred the same to University City, thereby shielding the Sorrento Property from foreclosure without subjecting their remaining assets to the jurisdiction of the Court. Moreover, they subjected the Sorrento Property, upon which The Sixty Trust held a secured lien, to the claims of the creditors of University City who would not otherwise have had the right to look to said property for satisfaction. Such manipulations of ownership for the purpose of hindering and delaying secured creditors from enforcing their liens have not and cannot be countenanced.

The District Court erred in refusing to follow these well-established precedents; it erred in approving, confirming and adopting the Referee's Report to the effect that the transfer of the Sorrento Property did not work a fraud on any creditor and it erred as a matter of law in approving the Petition as having been filed in good faith.

Conclusion.

The Sixty Trust submits that the only finding consistent with the testimony in this case is a finding to the effect that transfer by Kahn and Tavares of the Sorrento Property to University City on the eve of the filing of the Petition solely to bring said property within the scope of the injunctive power of the District Court so as to enjoin The Sixty Trust from proceeding with foreclosure sales under its deeds of trust securing said property demonstrates such a lack of good faith as to compel, as a matter of law, a dismissal of the Petition of University City in its entirety. This is particularly true where, as here, the Board of Directors of University City knowingly participated in the scheme.

Accordingly, The Sixty Trust respectfully petitions the Court of Appeals for its judgment reversing the order of the District Court approving the Petition and directing the District Court to dismiss said Petition as not having been filed in good faith.

Alternatively, The Sixty Trust respectfully petitions the Court of Appeals for its judgment reversing the District Court's approval of the Petition insofar as it relates to the Sorrento Property and directing that the Sorrento Property be segregated from the remaining assets of this estate, that the Order restraining the stay be vacated insofar as it relates to such property, and that Appellants herein be given leave to enforce their liens against said property and to foreclose their deeds of trust thereon in accordance with the terms thereof as authorized by the laws of the State of California.

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The Sixty Trust.

No. 22802

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE SIXTY TRUST,

Appellant,

vs.

WM. B. ENRIGHT, Trustee, etc.,

Appellee.

BRIEF FOR THE APPELLEE, WILLIAM
B. ENRIGHT, TRUSTEE.

FILED

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List of Abbreviations.

- P. Petition
- A. Answer to Petition for Reorganization
- R. Transcript of Record
- AR. Additional Transcript of Record
- V. I Volume I of Transcript of Proceedings held on
June 28, 1967
- V. II Volume II of Transcript of Proceedings held
on June 30, 1967
- V. III Volume III of Transcript of Proceedings held
on June 30, 1967
- Tr. Transcript of Proceedings held on September
21, 1967
- Ex. Exhibits to hearing held on June 28, 1967 and
June 30, 1967

No. 22802

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THE SIXTY TRUST,

Appellant,

vs.

WM. B. ENRIGHT, Trustee, etc.,

Appellee.

BRIEF FOR THE APPELLEE, WILLIAM B. ENRIGHT, TRUSTEE.

I.

Statement of Jurisdiction.

The Debtor filed a voluntary petition for the reorganization of a corporation, pursuant to the provisions of Chapter X of the Bankruptcy Act (Title 11 U.S.C. Sections 501-676). The jurisdiction of the United States District Court in this matter is predicated upon Title 11 U.S.C. Sections 46, 502, 511, and 528.

The jurisdiction of the Court of Appeals to hear this matter on appeal is predicated upon Title 11 U.S.C. Sections 47, 48, and 521.

II.

Statement of the Case.

University City, a California corporation, filed its petition for the reorganization of a corporation on April 25, 1967 [R. 2]. The District Court, upon consideration of the petition and the allegations contained therein, issued its initial order approving the petition and appointing Trustee, order of reference and restraining order and amendment thereto [R. 23-29]. Appellant, The Sixty Trust, a secured creditor of the Debtor, filed its answer to the petition for reorganization [R. 37], pursuant to the provisions of Section 137 of the Bankruptcy Act (Title 11 U.S.C. Section 537), seeking dismissal of the Chapter X petition pursuant to the provisions of Section 144 of Chapter X of the Bankruptcy Act (Title 11 U.S.C. Section 544), on the ground that the proceedings were not filed in good faith within the meaning of Section 146 of Chapter X of the Bankruptcy Act (Title 11 U.S.C. Section 546).

The answer of appellant denied certain allegations of the petition, and put the Debtor to its proof. The major thrust of appellant in the proceedings below as set forth in the second defense of the answer of appellant [A. 3, R. 37] was that the petition was not filed in good faith as defined in Section 146(3) of the Bankruptcy Act, in that it is unreasonable to expect that a plan of reorganization can be effected by the petitioner for certain reasons set forth in the answer. Appellant also set forth as a special defense to the proceeding, that a portion of the Debtor's real property had been transferred to it shortly before the Chapter X proceedings by certain officers, shareholders and directors for the purpose of bringing said property with-

in the injunctive power of the corporate reorganization court.

There was a two-day hearing before the Referee and Special Master, pursuant to Section 144 of the Bankruptcy Act (Title 11 U.S.C. Section 544), following which the Referee and Special Master, on August 16, 1967, filed her report and proposed findings of fact and conclusions of law [R. 76-81]. Appellant filed its objections to the report, findings and conclusions of the Referee and Special Master [R. 84-96], and oral argument was presented to the District Judge. The District Court, on October 3, 1967, issued its order confirming the Referee and Special Master's report, findings and conclusions of law, and approving petition pursuant to Section 144 [R. 102]. The report of the Referee and Special Master, which was confirmed and approved by the District Judge, and her findings of fact and conclusions of law which were adopted as the findings of fact and conclusions of law of the District Court, are enlightening and an appropriate starting point for consideration of this appeal.

The essential jurisdictional requirements of Chapter X were found to exist. It was found in Finding of Fact 6 that the principal assets of the Debtor consist of approximately 2400 acres of real property situated in the northern part of the city of San Diego, consisting of approximately 1500 acres known as University City, with a fair market value of approximately \$15 Million to \$17 Million and approximately 900 acres known as Sorrento Properties, with a fair market value of \$5 Million. The total value of the real property was, therefore, found to be between \$20 Million to \$22 Million. The indebtedness owing to appellant was found

to be approximately \$10,390,000.00 as of April 28, 1967. In view of this substantial equity over and above the lien of appellant herein of approximately \$10 Million, the Court found, in Finding of Fact 8, that it was reasonable to expect that a plan of reorganization could be effected. The Court further found in Finding of Fact 10 that the Debtor's petition was filed in good faith as required by Section 144 of the Act. The Referee and Special Master reported that the property known as the Sorrento Properties, was subject to the same indebtedness as the Debtor owed to appellant at the time it was transferred to the Debtor, and that because of its location near the other properties of the Debtor, it is reasonable to develop it as one unit. The Referee and Special Master upon consideration of the evidence, reported that the transfer of the property to the Debtor was in the interest of the Debtor, because the Debtor acceded to a large equity in said property, and furthermore that the transfer did not result in a fraud upon any creditor. The court concluded, in Conclusion 5, that the petition was filed in good faith and should be approved, and in Conclusion 6, that the Debtor is entitled to relief under Chapter X of the Bankruptcy Act.

The thrust of the position of appellant in the Court below was that it was unreasonable to expect that a plan of reorganization could be effected in the fact of the opposition of The Sixty Trust. Therefore, the proceedings should be dismissed. This is shown in the objections to the report of the Special Master, findings

of fact and conclusions of law upon contested petition filed under Chapter X [R. 84] page 11, lines 25 through 27, wherein it was stated as follows:

“The only issue before the Court is whether it is reasonable that a plan of reorganization can be effected in the face of the announced opposition of The Sixty Trust, . . .”.

It is apparent that the appellant has now abandoned its attack on the essential allegations of the petition; have accepted the essential findings that there is a substantial equity in the real property, and that it is reasonable to expect that a plan of reorganization can be effected, and have, instead, chosen to rely on the fact that out of 2400 acres belonging to the Debtor, some 900 acres thereof were transferred to the Debtor shortly before the filing of these proceedings, in order to bring said property within the jurisdiction of the reorganization court, as the sole basis to force a dismissal of the entire Chapter X proceedings.

III.

Issue on Appeal.

Assuming all of the findings of fact of the District Court are correct, and assuming all of the conclusions of law of the District Court are correct, must the fact that, shortly prior to the filing of the Chapter X proceedings two of the principals of University City transferred 900 out of the 2400 acres to University City, force the Appellate Court to direct a dismissal of the corporate reorganization proceedings under the circumstances of this case.

IV.

The Evidence and the Record.

Appellant, in its brief, has examined one sentence in three volumes of transcript, and has ignored all the rest. Appellant has cited Mr. Carlos Tavares, a candid, honest and highly respected man, as testifying,

“Well, we deeded it to University City because we wanted to protect our interest in the land that was being foreclosed by The Sixty Trust” [V. I, 31:20-24].

Now, let us look at the rest of the record.

Sorrento Properties, Inc. was a corporation that was dissolved in December, 1966 [V. I, p. 30, line 16]. Just prior to its dissolution, it owned some 900 acres of real property immediately adjacent to the real property owned by University City [V. I, p. 31, line 4]. The original shareholders and principals of both University City and Sorrento Properties, Inc., to wit, Kahn, Tavares, and Lesser, are substantially the same [V. II, p. 55, line 24]. Sorrento Properties, Inc., owned by the same principals as University City, never really functioned, but served only as an appendant to and adjunct of University City. Sorrento never issued any stock [V. II, p. 51, line 10]. It never sold any of its real property during its existence [V. II, p. 49, line 13]. Its Board of Directors never functioned [V. II, p. 55, line 1]. That every dealing Sorrento had were so inter-related with the affairs of University City, as to make their separate existence a fiction. Consider the following evidence. Tavares testified with reference to the affairs of Sorrento Properties [V. II, p. 53, line 13]:

“Early in 1961, we (Sorrento) had a first loan with Pacific Finance of which totalled almost two

and a half million, and all the money that was received on the two and a half million went to University City.”

The supplemental clerk’s transcript of record at page 29 shows this promissory note dated July 10, 1961 in the amount of \$2,500,000.00 in favor of Pacific Finance Corporation. It was actually executed by both Sorrento Properties, Inc. and University City. This note and the trust deed which covers the property of both corporations were assigned to The Sixty Trust [Supplemental Clerk’s Transcript p. 74], and makes up part of the claim of The Sixty Trust and its wholly-owned subsidiary S.D. Land, Inc.

In 1963, University City borrowed an additional \$4,250,000.00 from The Sixty Trust, increasing its obligation to The Sixty Trust to \$9,250,000.00 [Supplemental Clerk’s Transcript, p. 10]. The note was executed only by University City. However, the deed of trust given to secure the note of \$9,250,000.00 was executed both by University City and Sorrento Properties, Inc. The property covered in said deed of trust, which stood as security for said note, is the property of both University City and Sorrento Properties, Inc. [Supplemental Clerk’s Transcript, p. 35]. Similarly, the succeeding notes to The Sixty Trust in 1964 and February 1, 1965, were executed only by University City. However, the deeds of trust covered the property of both University City and Sorrento Properties, Inc. [Supplemental Clerk’s Transcript pp. 17-28, 55-65].

What happened to the money University City borrowed from The Sixty Trust in 1963? Mr. Tavares testified [V. II, p. 39, line 17]:

“When Mr. Kahn in 1963 went to Sixty Trust to get an additional loan of \$5 Million, he finally

got \$4,250,000, and there was not adequate security of University City, based on their 60% loan or 70% loan, and they required land from Sorrento Properties to be used as collateral.”

Of the monies borrowed by University City in 1963, it paid over \$657,000.00 thereof to Sorrento Properties, Inc. [V. II, p. 53, line 21]. In other words, in 1961 Sorrento had paid over some two and a half million dollars to University City. In 1963 University City had paid over some \$657,000.00 to Sorrento. Mr. Tavares testified in some detail concerning these transfers of money [V. II, p. 53, line 21]:

“ . . . the only monies that Sorrento Property got in 1963 was the \$657,000.00 in cash to pay off some first trust deeds that were 5% trust deeds stating in there, 10% loan from Sixty Trust. Mr. Kahn used Sorrento Properties’ cross-collateralized, used it primarily as a vehicle to provide money for University City, and there is no question about that.

“Q. And you disapproved of course?

“A. I didn’t say I disapproved; the only way that Sorrento Properties and University City could be one and only, and I would have had no objection.

“Q. They weren’t?

“A. They might not have been, because you have two different corporations, BUT ACTUALLY, I THINK THEY WERE.” (Emphasis added).

By the time Sorrento Properties, Inc. was dissolved in December of 1966, Tavares had bought out Lesser’s interest and the assets of Sorrento Properties, Inc. was to be divided two-thirds to Tavares and one-third to

Kahn [V. I, p. 31, line 7]. This dissolution was entered into for tax purposes [V. II, p. 83, line 17]. Shortly before the filing of the Chapter X proceedings, the 900 acres formerly belonging to Sorrento Properties, Inc. was transferred into the name of University City [V. II, p. 94, line 7].

Immediately before the transfer of the 900 acres from Sorrento to University City, the books of University City showed an account receivable due from Sorrento Properties, Inc. in the amount of \$2,661,813.09. This receivable from Sorrento to University City was eliminated upon the transfer of the land [V. I, p. 82, line 11; p. 83, line 18].

In other words, immediately prior to the filing of the Chapter X proceedings, the Debtor was indebted to The Sixty Trust in an amount approximating \$10 Million. The principals of University City and Sorrento Properties, Inc. allocated the total amount of those loans and determined that \$2,661,813.09 was Sorrento's share. This receivable then represented the allocate share charged to Sorrento of the monies borrowed by University City on the note and trust deeds held by The Sixty Trust [V. II, p. 68, line 14].

So intertwined were the financial affairs of University City and Sorrento Properties, Inc., that merger was discussed between them in 1963 and 1965 [V. III, p. 131, line 17].

Not only were their financial affairs inexorably intertwined, but the properties owned by the two "separate" entities was immediately adjacent to one another and basically part of one development. Sworn statement of Mr. Tavares was quoted by the appellant in its opening brief. Mr. Tavares, however, went on to

explain that statement and the explanation was not quoted by the appellant. We now refer the Honorable Court of Appeals to Mr. Tavares' explanation as to why the 900 acres was put into the reorganization proceedings of University City [V. I, p. 38, line 4]:

"On that date, Mr. Kahn and myself and the rest of the Directors of University City decided that this was the best course, because there was no other way for us to look at it. There was only one loan that covered the entire indebtedness, and Sorrento Properties was cross-collateralized and we couldn't possibly segregate it.

"Referee Rossi: Was it considered as one deal?

"The Witness: One development."

Further at V. I, page 38, line 21:

"Q. Tell me who you meant when you indicated it was always considered by all of you as one development?

"A. Mr. Lesser, Mr. Kahn and myself; we have always considered this as one development, because when we agreed to put a loan with Sixty Trust, we gave up some very good valuable piece of property to help University City."

So the logic of the transaction becomes apparent. How can you reorganize a part of a development? If a reorganization was to make sense the entire development had to be reorganized as an entity. This was not a last minute device to hinder, delay or defraud anyone. The parties always considered this to be one development, and the Referee and the District Judge so found. They believed Mr. Tavares when he testified as to the basis of the transfer and that the transfer was not to defraud creditors [V. I, p. 32, line 10; p. 33, line 8].

V.

Argument.

On appeal, it is basically not the duty of the appellee to show that there is evidence in the record to support the findings and conclusions of the District Court. Nevertheless, so convinced is the Trustee, not only that the findings and conclusions of the District Court were not clearly erroneous, but rather, that the facts, the logic and the realities of the situation compelled the decision that was reached by the Referee and Special Master, and by the District Judge.

The appellant has referred this Honorable Court to cases which are not at all applicable to the factual situation of these proceedings. The Sixty Trust is not essentially a creditor of Sorrento Properties, Inc., or of Kahn and Tavares in connection with its claim herein. It is a creditor of University City. How could it be defrauded, or how could any of the creditors of University City be defrauded by the deeding to University City of additional assets? If the insolvency cases cited are a correct statement of the law, and we submit they are not generally accepted as a correct statement of the law, they are still not applicable to the facts of this case. First, The Sixty Trust and the other creditors of University City could not have been hindered, delayed or defrauded by the deeding to University City of additional assets. Second, University City was not an entity created and set up by Kahn and Tavares in order to hinder, delay or defraud its creditors. No such creditors of Kahn or Tavares have come into these proceedings to complain of the transfer. They would appear to be the only such creditors with standing to complain. What we have in this case were obligations against the

land in favor of a creditor of University City, which obligations against the land remained unchanged before and after the deeding. As Judge Carter stated in the hearing below [Tr. p. 4, line 11]:

“How did deeding it to University City protect their interests?”

At line 14 he stated:

“It couldn’t change the obligations against the property, could it?”

Finally, at page 6, line 17 Judge Carter stated:

“The Sixty Trust still had the same obligations on the property, secured obligations, it had before, right? Their prejudice, if any, is the delay that might entail from a Chapter X.”

It is clear then, that the District Judge, as well as the Referee and Special Master, concluded that this was not a case of fraud and that there was no absence of good faith. Their decision, surely was not “clearly erroneous”.

The factual situation of these proceedings shows up the danger of attempting to apply a hard and fast rule of law to every case at hand. The cases cited by appellant stand for the proposition that where an individual debtor transfers his assets to a newly formed, wholly owned corporation, which thereby acquires all of its assets, and thereby assumes all of its obligations, and such newly formed corporation immediately files a voluntary petition for reorganization, a legal fraud has been perpetrated, which would justify the Court, *ipso facto*, in dismissing the reorganization proceedings.

This matter is commented on succinctly in *6 Collier on Bankruptcy*, 14th Edition, page 1028. The author states:

“As to whether this constitutes bad faith, the courts are not in agreement. The Eighth Circuit has declared that such a transaction perpetrates a legal fraud on creditors and that it is without the intendment of the statute to construe as within the scope a corporation formed to take over the property of an individual debtor for the purpose of using the statute. The Seventh Circuit, however, has taken the position that circumstances may warrant a departure from such a rule. *In Matter of Loeb Apartments, Inc.*, (CCA 7th, 1937) 89 F.2d 461 the court stated:

‘No one evidentiary fact can ordinarily be given paramount weight in deciding the question. If it is obvious that if a debtor is attempting unreasonably to defer and harass creditors in their bona fide efforts to realize upon their securities, good faith does not exist. But if it is apparent that the purpose is not to delay or defeat creditors but rather to put an end to long delays, administrative expenses, statutory periods of redemption and unreasonable obstruction by minorities, incident too frequently, we are sorry to observe, to mortgage foreclosure, and to invoke the operation of the act in the spirit indicated by Congress in the legislation, namely, to attempt to effect a speedy efficient reorganization, upon a feasible basis, supported by more than two-thirds of all the creditors, good faith cannot be denied.’

‘. . . It is urged that the fact that it seems probable that this corporation was organized for the

purpose of filing a petition . . . is a bar to a finding of good faith. No court is justified in making this one fact, arbitrarily, the determinative factor of good faith.'

"This seems to be the better view and exemplifies the flexible nature of the concept of good faith in its relation to the particular conditions presented for the judge's scrutiny."

To the same effect see *Kreuger v. Knickerbocker Hotel Co.* (CCA 7th, 1936) 81 F. 2d 981.

Your Trustee, therefore, would take the position that even if University City were newly organized on the eve of the filing of the Chapter X proceedings for the sole purpose of filing the Chapter X proceeding, and even if University City had received all of its assets and liabilities from Kahn and Tavares on the eve of filing the Chapter X proceedings, the District Judge would be justified in going into all of the facts surrounding the transfers in determining good faith.

However, this is not the fact in these proceedings. The cases cited and the proposition of law urged by the appellant herein are just not applicable to these proceedings. University City existed and did business, including substantial business with appellant, for years. The proof of claim filed by The Sixty Trust herein contains promissory notes and deeds of trust going back to July 10, 1961. [Supplemental Clerk's Transcript, p. 6]. In addition, the obligations of University City in these proceedings are not the obligations of Kahn and Tavares, but the obligations of University City. In addition, the major portion of the property was not deeded to it by Kahn and Tavares, but was owned

by University City for years. Only 900 out of 2400 acres were deeded.

Finally, appellant has asked this Court, at the very minimum, to exclude, “the transferred property from the reorganization proceeding and the vacating of the restraining order relative to their property” (Appellant’s opening brief, p. 7).

Appellant argued this same issue before the Referee and Special Master and before the District Judge. Both concluded that the instant proceeding was a good faith hearing only; that good faith was the only matter before the Court to decide; not whether or not leave should be granted to foreclose on a particular portion of the property of the Debtor. Such an issue as was stated by the Referee and Special Master [V. I, p. 42, line 18]:

“Well, that would unduly complicate the present proceeding. It seems to me if you want to lift the restraining order, file a petition and bring it on for hearing and put on evidence; that is a separate issue in itself and not properly at issue, I don’t believe in the Section 144 answer, but you can bring it on and I will hear it if you want to. I don’t want to have it mixed up.”

The Trustee urges that the Referee and Special Master and the District Judge were both correct in refusing to be so sidetracked.

The Trustee urges upon this Court a reading of the very recent case of *DeMet v. Harralson* (C.A. 5th, 1968) CCH Bankruptcy Reports, paragraph 62838, p. 72443 at 72445, where in the Court stated:

“As an appellant tribunal, we must give deference to the finding of the referee who was in

closer proximity to the economic life of the bankrupt, to the parties involved in its birth and demise, and to its transactional history.”

Further at page 72445:

“Moreover, application of the clearly erroneous doctrine becomes paramount when, as here, the district court has approved the referee’s determination.

Your Trustee respectfully concludes by urging not only that the decision of the District Court and the Referee and Special Master were not clearly erroneous, but rather, that they were eminently correct. The fact that appellant has withdrawn from its attack upon the position that it was unreasonable to expect that a plan of reorganization could be effected, the fact that the appellant has withdrawn from its attack on the elements in the petition essential to support approval of a Chapter X proceeding, the fact that the appellant has instead chosen to rely on one fact alone, namely the transfer of 900 acres shortly before the filing of the proceedings, and the fact that the record and the evidence amply show that this transfer was not fraudulent and that there were good, economic and business reasons for the transfer to take place, and for the 900 acres to be included in the reorganization, all point to the soundness of the decision below. Your Trustee respectfully urges that the decision below be affirmed.

Respectfully submitted,

IRVING SULMEYER,
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*Attorneys for Appellee William B.
Enright, Trustee in the matter
of University City, Debtor.*

No. 22802

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE SIXTY TRUST,

Appellant,

vs.

WM. B. ENRIGHT, TRUSTEE, ETC.,

Appellees.

REPLY BRIEF FOR APPELLANT.

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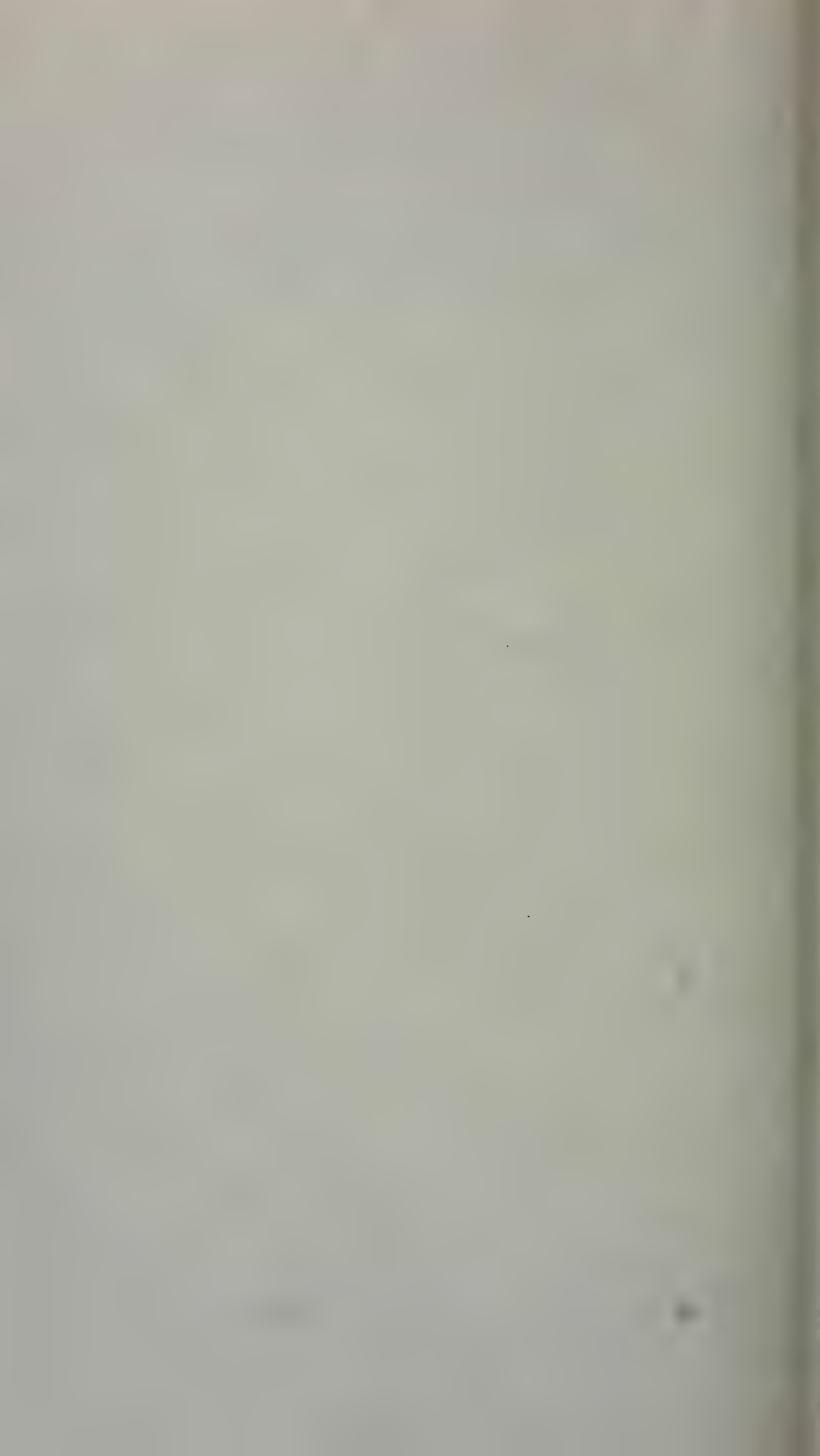
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List of Abbreviations.

P.	Petition
A.	Answer to Petition for Reorganization
R.	Transcript of Record
AR.	Additional Transcript of Record
V. I	Volume I of Transcript of Proceedings held on June 28, 1967
V. II	Volume II of Transcript of Proceedings held on June 30, 1967
V. III	Volume III of Transcript of Proceedings held on June 30, 1967
Tr.	Transcript of Proceedings held on September 21, 1967
Ex.	Exhibits to hearing held on June 28, 1967 and June 30, 1967

No. 22802

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE SIXTY TRUST,

Appellant,

vs.

WM. B. ENRIGHT, TRUSTEE, ETC.,

Appellees.

REPLY BRIEF FOR APPELLANT.

I.

Jurisdictional Statement.

The basis upon which this Court has jurisdiction to review the propriety of the Order of the District Court from which the instant appeal was taken was set forth under this heading in the Opening Brief For Appellant and shall not be repeated.

II.

Statement of the Case.

The relevant historical and evidentiary background of this controversy was set forth under this heading in the Opening Brief for Appellant filed herein and reference is made thereto. The Brief filed on behalf of Appellee Enright incorrectly asserts that Appellant has abandoned its attack on the allegations of the Petition and has accepted the findings that there is an equity in the real property and that it is reasonable to expect

a Plan of Reorganization to be effected. Such is not the case. As set forth in the Opening Brief for Appellant under the heading Specification of Errors Relied Upon, Appellant claims that the District Court erred in adopting and approving the Referee's Report, Findings of Fact, and Conclusions of Law. Since the Report, Findings and Conclusions were listed as Errors Relied Upon by Appellant in its Opening Brief, Appellant clearly has not "abandoned" any issue or "accepted" any such findings. The bases upon which Appellant claims the Report, Findings and Conclusions to be erroneous are set forth in the Objections to Proposed Report of Special Master [R. 62-75], Objections to Report of Special Master [R. 84-96], and Supplementary Objections to Report of Special Master [R. 97-100].

III.

Questions for Decision by This Court.

The sole issues before this Court are whether the District Court erred in approving the Report, Findings and Conclusions of Special Master; whether two individuals may segregate a portion of their individually-owned property, transfer that property to a controlled corporation, and then cause that corporation to file a Reorganization Petition so as to bring said property within the automatic injunctive power of the District Court and thus protect their individual equity in said property from foreclosure by the holder of deeds of trust encumbering said property; whether such a transfer on the eve of filing of the Reorganization Petition shows such a total absence of good faith as to taint the entire proceeding requiring a dismissal of the Petition; and whether such a transfer shows a sufficient lack of good faith to require, at the very minimum,

the exclusion of the transferred property from the reorganization proceeding and the vacating of the restraining order relative to said property.

IV.

Specification of Errors Relied Upon.

The specification of errors relied upon are set forth in detail in the Opening Brief filed by Appellant and will not be repeated here.

V.

Argument

The primary issue before this Court is whether the transfer of the Sorrento Property by Kahn and Tavares to University City on the eve of bankruptcy was done in good faith. Appellant submits that the intent of Tavares and Kahn at the time they acquired title to the Sorrento Property from Sorrento Properties, Inc. on December 30, 1966 and the intent of Tavares and Kahn at the time they transferred title to University City on April 20, 1967 are the crucial relevant factors to be considered on the issue of good faith.

There is no dispute on the record as to either the method by which University City acquired title to the Sorrento Property or the intent of Tavares and Kahn at each step of the proceedings.

As of December, 1966, the 900 acres designated herein as the Sorrento Property was owned by a California corporation entitled Sorrento Properties, Inc. [V. I; 29:18-31:11]. As of December, 1966, this corporation was owned two-thirds by Tavares and one-third by Kahn [V. I; 31:7-11]. On December 30, 1966, Sorrento Properties, Inc. was dissolved and all assets and liabilities of Sorrento Properties, Inc., including the 900

acres designated herein as the Sorrento Property, was transferred two-thirds to Tavares and one-third to Kahn individually [V. I; 31:5-15; Ex. J.]. The intent of the parties at the time of the transfer of the Sorrento Property from Sorrento Properties, Inc. to Tavares and Kahn is best expressed by the following testimony of Tavares at the good faith hearing:

[By Mr. Dunlavey]

“Q. Was the intent at the time these Deeds were executed, this was going to be the first step toward putting Sorrento Property over into the University City?

A. This was not the first step in putting this property into University City.” [V. II; 83:12-16].

* * * *

[By Mr. Dunlavey]

“Q. Can you tell me, Mr. Tavares, either yes or no, whatever the explanation you want to give after that, whether these Deeds were given at the time when you intended that the property ultimately was going to be reconveyed to University City.

A. On my word of honor, no.” [V. II; 84:1-7].

In April of 1967, immediately prior to the filing of the Reorganization Petition by University City, Kahn and Tavares transferred the Sorrento Property to University City [Ex. K]. The intent of the parties as to the purpose of this transfer is again best explained by the following testimony of Tavares:

[By Mr. Dunlavey]

“Q. And why was it you deeded that particular property to University City?

A. Well, we deeded it to University City because we wanted to protect our interest in the land that was being foreclosed by Sixty Trust.” [V. I; 31: 20-24].

The Board of Directors of University City had full knowledge that such was the purpose of the transfer [Ex. D].

Thus, regardless of the evidence relied upon by Appellee Enright at pages 6 through 10 of his Brief, it is clear that the dissolution of Sorrento Properties, Inc. on December 30, 1966 was not the first step in putting the Sorrento Property into University City and that the individual principals had no intent as of December 30, 1966 to transfer the Sorrento Property to University City. The transfer to University City was only ultimately made by Kahn and Tavares on April 20, 1967 to save their individual equity in the Sorrento Property from being foreclosed by Appellant. These are the pertinent facts that compel the conclusion that the transfer exhibits such a lack of good faith as to dictate a dismissal of the entire reorganization proceeding, or at the very least, a segregation of the Sorrento Property from the remaining assets and the vacating of the restraining order as to such property so as to allow Appellant to proceed to foreclose its deeds of trust thereon.

Appellee Enright states that the Court should ignore this pertinent conclusive testimony and should look to the other factors outlined at pages 6 through 10 of his Brief. Thus, he refers to a prior history of dealings and states that “the original shareholders and principals of both University City and Sorrento Properties, Inc. . . . are substantially the same” (Brief for Appellee Enright, p. 6) and further that “Sorrento Properties,

Inc. [was] owned by the same principals as University City.” (Brief for Appellee Enright, p. 6). Such was not the case. Since 1964, Carlos Tavares and Irvin J. Kahn were the only shareholders of University City who also held an ownership interest in Sorrento Properties, Inc. [V. I; 63:9-19]. In addition to Kahn and Tavares, the shareholders of University City included Louis Lesser Enterprises, Ltd. which owned 20%, Mr. Carlstrom who owned 20%, and Mr. Smith who owned 10% [V. I; 44:3-18]. None of these individuals had any ownership in Sorrento Properties, Inc. from 1964 to its dissolution. Accordingly, since at least 1964, the holders of 50% of the stock of University City had absolutely no proprietary interest in Sorrento Properties, Inc. Obviously, University City and Sorrento Properties, Inc. were separate corporations with separate ownership.

Appellee Enright also states that the Sorrento Property was “immediately adjacent” to the land owned by University City (Brief for Appellee Enright, p. 9). Such is not the case. The Sorrento Property consists of six non-contiguous separate parcels, each of which is a considerable distance from the land owned by University City and from each other [Ex. 3]. The “one development” idea was obviously not true in December of 1966 since Tavares testified that he had no intent at that time of transferring the Sorrento Property to University City [V. II; 83:12-84:7].

Appellee Enright also indicates that merger discussions occurred between the principals of University City and Sorrento Properties, Inc. in 1963 and 1965 (Brief for Appellee Enright, p. 9). Significantly, however, no merger ever took place.

Appellee University City also urges this Court to ignore the admitted purpose of the transfer of the Sorrento Property to University City because University City allegedly acceded to a large equity in the Sorrento Property by accepting the same in full payment of a receivable in the amount of \$2,661,813.09 owed by Sorrento Properties, Inc. [V. I; 82:11-83:18] and assumed by Kahn and Tavares on the dissolution of Sorrento Properties, Inc. [Ex. I]. The alleged equity presumably stems from the difference between the value of the Sorrento Property, found by the Referee and approved by the District Court, to be \$5,000,000 and the receivable of \$2,661,813.09. The finding of value was premised solely upon the testimony of Carlos Tavares, admitted over the objection of Appellant, to the effect that the property was worth \$5,000,000 [V. I; 25:10-23]. Appellant contended and still contends that such testimony of a person admittedly interested in the outcome of the proceeding cannot be sustained in light of the fact that the Sorrento Property was acquired from 1959 to 1962 for a total purchase price of \$1,-320,798.00 [Ex. H; V. I; 62:14-17; V. II, 59:21-24]. Except for some water and sewer lines, the Sorrento Property is in the same raw, undeveloped, unimproved condition as when acquired [V. I; 62:2-5; V. II; 65:2-12]. The terrain is rolling with gullies [V. II; 75:25-26] and has not been graded [V. II; 65:2-5]. It has no access to any freeway or roads [V. II; 65:2-5; V. II; 65:10-12] and is several years away from development [V. II; 113:23-114:1].

As late as 1964, Tavares purchased the one-third interest of Louis Lesser Enterprises, Ltd. in Sorrento Properties, Inc. for a \$500,000 non-interest-bearing

note [V. I; 63:9-19]. Accordingly, as late as 1964, even the owners of the Sorrento Property valued it at not more than \$1,500,000. To say that the same property valued by the parties at \$1,500,000 in 1964 is somehow magically worth \$5,000,000 in 1967 is contrary to reason and logic. Accordingly, Appellant submits that University City acceded to no equity in the property.

In point of fact, another reason for the transfer by Kahn and Tavares of the Sorrento Property to University City probably stems from their fear that the Trustee in Reorganization would look to them for payment of the \$2,661,813.09 receivable which they assumed at the dissolution of Sorrento Properties, Inc. [Ex. 1]. Instead of paying this amount, however, they discharged the receivable of \$2,661,813.09 by transferring the Sorrento Property which they had valued as recently as 1964 as being worth only \$1,500,000.

Appellant submits that all of the arguments advanced by Appellees are mere window dressings designed to hide the crucial elements of the intent and purpose behind the transfer. Even Appellee University City admits that the fact that property was transferred to a debtor for the purpose of obtaining the injunctive protection offered by Chapter X is a factor to be considered in determining good faith (Brief for Appellee University City, p. 8). Appellee University City relies heavily upon *In re Knickerbocker Hotel Co.* (7th Cir. 1936, 81 F. 2d 981) but fails to point out to the Court the rather unique factual situation that existed in that case. In *Knickerbocker*, a corporation had issued bonds secured by a deed of trust. Upon default in the bonds, a bondholder's protective committee was organized and approximately 98% of the unpaid bonds were deposited

with such committee. The Trustee under the indenture securing the bonds filed an action to foreclose the mortgage in a state court and a receiver was appointed to operate the properties. The bondholder's committee bid in at the foreclosure sale and purchased the property. The bondholder's committee, with the approval of the holders of 98% of the unpaid bonds, formulated a plan for reorganization which they sought to effectuate in the state court proceeding. The chancellor refused to confirm the sale or the plan, removed the receiver and enjoined any person from bringing about a reorganization. This order was reversed subsequently on appeal. The bondholder's protective committee thereupon organized a corporation and conveyed title to the property to said corporation subject to the bonds. The newly-formed corporation filed a Petition for Reorganization under the then applicable Section 77B of the Bankruptcy Act.

The Circuit Court's refusal to find bad faith in *Knickerbocker* is clearly distinguishable from the instant action. Thus, in *Knickerbocker*, the Petition was filed by a corporation organized by the holders of 98% of the bonds, who were actually the secured creditors who had become the owners of the property by bidding at the foreclosure sale. The state court had refused to approve the sale at the instance of a few of the remaining 2% holders of the bonds. In approving the organization of the corporation and the filing of the Petition for Reorganization, the Circuit Court stated as follows:

"We find that a large bond issue has been floated on corporate property; default made; foreclosure proceedings instituted in the state court; receiver

appointed by state court who went into possession and operated the property for more than five years prior to the petition herein; a gross income of more than two and one-half million dollars collected; \$85,000 paid to the receiver for his compensation; \$31,500 paid to receiver's attorney; nothing paid to bondholders by way of principal or interest; taxes in the sum of \$101,000 permitted to accumulate and remain unpaid; value of property shrunk far below incumbrance. Finally a plan of reorganization was worked out which was satisfactory to 98 per cent of the bondholders who were the real owners of the property. The state courts being somewhat restricted in making effective proposed reorganizations when confronted by minority opposition (see *Chicago Title and Trust Co. v. Robin*, 361 Ill. 261, 198 N.E. 4, *Chicago Title and Trust Co. v. Bamburg*, 361 Ill. 291, 198 N.E. 10), it was deemed advisable to proceed with a foreclosure sale of the property which was bid in by the bondholders' committee. At the instance of a few of the 2 per cent. of non-assenting bondholders the state court declined to approve the sale, essayed by injunction to retain control, brought forth a fresh receiver, and entered upon the announced purpose of a further period of receivership operation.

The bewildered bondholders were thus confronted with a condition and not a theory; they had invested their money in bonds of a corporation which had become insolvent through the crash of real estate values and other causes over which they had no control; they had honestly, as we believe.

taken various steps to bring about a fair adjustment of the unfortunate situation and had been thwarted in their purpose. Ninety-eight per cent. of them still had faith that a court of equity somewhere, somehow, would deliver them from bondage.

It is said that the purpose of Congress in the enactment of sections 77A and 77B of the Bankruptcy Act (11 U.S.C.A. §§206, 207) was the creation of machinery for the relief of distressed corporate debtors, yet equally important are the provisions which prevent a minority group from defeating the worthy plan of a majority—in short it is designed to prevent a minority group from developing a “nuisance” value far in excess of the actual value of their claims.”

In re Knickerbocker Hotel Co., 81 F. 2d 981, 984.

The Court further stated that:

“Stripped of the equities with which this case abounds, a different situation would, however, be presented.” *In re Knickerbocker Hotel Co.*, 81 F. 2d 981, 985.

* * * *

“Courts of equity will not aid those who defraud or deceive, but search as we may the conduct of the bondholders throughout these proceedings we find nothing that would justify a court of equity in closing its doors to them. On the contrary, their unfortunate situation cries loudly for relief.” *In re Knickerbocker Hotel Co.*, 81 F. 2d 981, 985.

Under such circumstances, the *Knickerbocker* case provides no solace for Appellees. Here we have two individuals owning property and transferring it to a con-

trolled corporation solely to protect their own equity from a foreclosure sale scheduled by the secured creditors. In *Knickerbocker*, we had 98% of the secured creditors purchasing the property at a foreclosure sale and seeking court aid to prevent the remaining 2% from, as stated by the Circuit Court, “developing a ‘nuisance’ value far in excess of the actual value of their claims” (at p. 984).

Accordingly, Appellees do not and cannot dispute that the sole purpose of the transfer by Tavares and Kahn of the Sorrento Property to University City was to avail themselves of the injunctive power of the District Court so as to protect their individual equity in the Sorrento Property and to hinder, delay and prevent Appellant from proceeding with the noticed foreclosure sale under its deeds of trust. Under such circumstances, the transfer cannot be sanctioned.

Milwaukee Postal Building Corp. v. McCann,
95 F. 2d 948;

In re North Kenmore Building Corp., 81 F. 2d
656;

Shapiro v. Wilgus, 287 U. S. 348.

VI.

Conclusion.

Appellant submits that the District Court erred in refusing to follow well-established precedents and that it erred in approving and adopting the Report of the Referee, the Findings of Fact and Conclusions of Law promulgated by the Referee. Appellant also submits that the District Court erred, as a matter of law, in approving the Petition as having been filed in good faith since the only Order consistent with the evidence and established authorities is that the transfer by Kahn

and Tavares of the Sorrento Property to University City on the eve of filing the Petition for Reorganization solely to bring such property within the injunctive power of the District Court so as to restrain Appellant from proceeding with its foreclosure sales demonstrates such a lack of good faith to compel, as a matter of law, the dismissal of the instant reorganization proceedings. Such a dismissal is peculiarly appropriate here since the Board of Directors of University City acquiesced in the transfer with full knowledge of its intent and purpose.

Accordingly, The Sixty Trust respectfully petitions the Court of Appeals for its judgment reversing the order of the District Court approving the Petition and directing the District Court to dismiss said Petition as not having been filed in good faith.

Alternatively, The Sixty Trust respectfully petitions the Court of Appeals for its judgment reversing the District Court's approval of the Petition insofar as it relates to the Sorrento Property and directing that the Sorrento Property be segregated from the remaining assets of this estate, that the Order restraining the stay be vacated insofar as it relates to such property, and that Appellant herein be given leave to enforce its liens against said property and to foreclose its deeds of trust thereon in accordance with the terms thereof as authorized by the laws of the State of California.

Respectfully submitted,

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N O. 2 2 8 0 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN LEGGETT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FEB 27 1968

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BRIEF OF APPELLEE

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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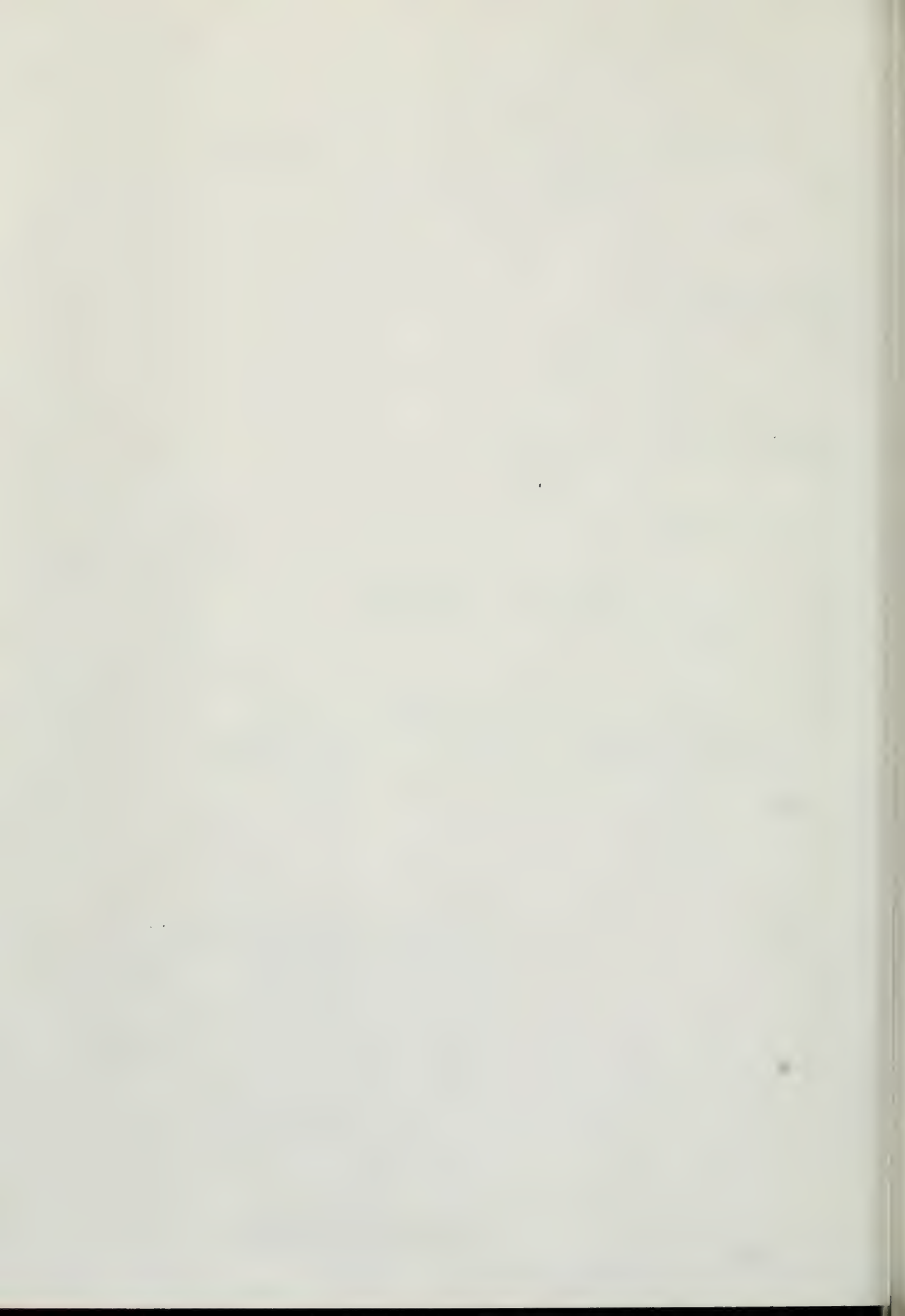
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BRIEF OF APPELLEE

I

JURISDICTIONAL STATEMENT

On December 27, 1967, the Federal Grand Jury for the Central District of California returned an indictment in one count charging John Leggett and Hosie McCloud with violation of Title 18, United States Code, Section 2113(a)(d). The indictment alleged that John Leggett and Hosie McCloud, knowingly and wilfully attempted to take money belonging to the Bank of America, 6951 Westminster Boulevard, Westminster, California and that in attempting to commit said offense, John Leggett and Hosie McCloud assaulted Arthur J. Schuker, Betty Buhrmester, and Mary Lemke

[C. T. p. 2]. 1/

On January 2, 1968, John Leggett and Hosie McCloud were arraigned and plead not guilty.

On January 30, 1968, John Leggett and Hosie McCloud appeared before the Honorable Charles H. Carr, United States District Judge. Hosie McCloud was permitted to withdraw his plea of not guilty, and the Court accepted his plea of guilty to a violation of Title 18, United States Code, Section 2113(a) [R. T. pp. 3-5]. 2/ John Leggett waived trial by jury [R. T. p. 16]. And on January 30, 1968, a court trial before Judge Carr was begun and John Leggett was found guilty as charged on that day [R. T. p. 112].

On February 19, 1968, John Leggett and Hosie McCloud were sentenced to the custody of the Attorney General for a period of twenty (20) years [R. T. pp. 130-131]. On February 23, 1968, John Leggett filed a timely Notice of Appeal [C. T. p. 15].

Jurisdiction of the District Court was based on Title 18, United States Code, Sections 2113 and 3231. Jurisdiction of this Court is based on Title 28, United States Code, Section 1294(1) and Rule 37(a) of the Federal Rules of Criminal Procedure.

1/ "C. T. " refers to Clerk's Transcript.

2/ "R. T. " refers to Reporter's Transcript.

II

COUNTER STATEMENT OF THE FACTS

On the morning of December 6, 1967, John Leggett, Hosie McCloud and Ivan Clark, also known as "Al" and also known as "Robert Smith", met at John Leggett's residence in Los Angeles, California. There, Ivan Clark told John Leggett and Hosie McCloud that he had a "job lined up". John Leggett, accompanied by Hosie McCloud in John Leggett's 1956 white Oldsmobile, drove to Westminster, California. Ivan Clark drove to Westminster, California in another car [R. T. pp. 65-66; pp. 77-80; pp. 82-83].

Somewhere in the vicinity of the Bank of America, 3/ 6951 Westminster Blvd., Westminster, California, 4/ John Leggett and Ivan Clark parked their respective cars. Ivan Clark told John Leggett and Hosie McCloud to wait for him and he left the area where the cars were parked on foot. Ivan Clark returned shortly thereafter and told John Leggett and Hosie McCloud that he had "cased" the place they intended to rob [R. T. pp. 65-67; pp. 84-85].

John Leggett, Hosie McCloud, and Ivan Clark drove past the bank in John Leggett's car several times, and on one occasion Ivan Clark directed attention to the bank [R. T. p. 67; pp. 86-87]. Subsequently, Ivan Clark and Hosie McCloud exited John Leggett's

3/ The deposits of the Bank of America, 6951 Westminster Blvd., Westminster, California are insured by the Federal Deposit Insurance Corporation [R. T. pp. 19-20].

4/ Hereinafter referred to as the bank.

car (Clark in the parking lot of the bank and McCloud near the south entrance to the bank) and John Leggett parked his car near the bank's south entrance [R. T. pp. 35-36; p. 87].

As Hosie McCloud, wearing a mask, entered the bank through its south entrance, he bumped into Walter Hardy, a bank customer who was leaving the bank. After encountering Walter Hardy, Hosie McCloud walked away from the bank toward John Leggett's car in which John Leggett was seated. Ivan Clark, wearing a mask, entered the bank at its north entrance. He ordered the people in the bank to lie on the floor and fired several shots into the ceiling. Thereafter, Hosie McCloud, still wearing a mask, entered the bank [R. T. p. 22; p. 27; p. 31; pp. 35-36; p. 89]. When Arthur Shukar, the Bank Manager, attempted to set off a silent alarm, Ivan Clark pointed a gun at him and said "Hold it". Hosie McCloud jumped over one of the counters and ran behind the teller cages. Apparently Ivan Clark yelled "Time" and Hosie McCloud and Ivan Clark then exited the bank and entered John Leggett's car still masked [R. T. p. 23; p. 27; p. 31; pp. 38-40; p. 93].

Shortly thereafter, John Leggett and Hosie McCloud were arrested [R. T. pp. 46-50]. John Leggett, after being fully advised of his constitutional rights, was interviewed by Federal Bureau of Investigation Agents, Francis A. Calley and Richard Cromwell [R. T. pp. 55-58]. Initially, John Leggett told the interviewing agents that he had driven to the city of Westminster in his 1956 white Oldsmobile with Robert Smith, a friend, for the purpose of looking for a job; that they had stopped at a gas station; and while

he (John Leggett) was in the restroom, Robert Smith disappeared with the 1956 white Oldsmobile; and that a short time thereafter he (John Leggett) and Hosie McCloud were arrested by officers of the Westminster Police Department [R. T. pp. 58-60].

John Leggett then recanted this story, and told the interviewing agents that on the morning of December 6, 1967, A1(LNU) and Hosie McCloud came over to his apartment in Los Angeles; and that he (John Leggett) intended to go to Westminster in response to an advertisement appearing in the newspaper for an automotive mechanic; that he and Hosie McCloud by arrangement met A1(LNU) in Westminster; that A1(LNU) joined him and Hosie McCloud in his car; that A1(LNU) told him he had an account at the bank; that he drove A1(LNU) and Hosie McCloud to the bank; that A1(LNU) and Hosie McCloud entered the bank while he waited outside in his car; that a few minutes later A1(LNU) and Hosie McCloud exited the bank and ran to his car; that A1(LNU) and Hosie McCloud told him to get away from the bank immediately; that he and Hosie McCloud parted company with A1(LNU) and then later he and Hosie McCloud were arrested by officers of the Westminster Police Department [R. T. pp. 60-63].

John Leggett recanted this story also and told the interviewing agents that on the morning of December 6, 1967, Ivan Clark and Hosie McCloud met at his apartment in Los Angeles where the three of them discussed perpetrating a robbery in the city of Westminster; that subsequently, he and Hosie McCloud met Ivan Clark in Westminster; that the three of them drove by the bank in his car several times; that he parked outside the bank while Ivan Clark and Hosie

McCloud entered the bank; and that a few moments later Ivan Clark and Hosie McCloud ran from the bank, entered the car and told him to leave the area immediately. In addition, John Leggett told the interviewing agents that he did not know that Ivan Clark and Hosie McCloud had entered the bank with the intent to rob it; that he did not see Ivan Clark and Hosie McCloud in possession of any masks or guns; and that when Ivan Clark and Hosie McCloud entered his car after exiting the bank, he was not aware that a robbery had been attempted [R. T. pp. 64-70].

At trial John Leggett denied having told the interviewing agents that he had gone to Westminster for the purpose of committing a robbery and also denied that on the morning of December 6, 1967, he had discussed with Al(LNU) and Hosie McCloud the commission of a robbery in the city of Westminster [R. T. pp. 98-100].

John Leggett further testified that he went to Westminster with Hosie McCloud to look for a job as a mechanic; that while he was attempting to locate the address of the mechanics shop he unexpectedly met an acquaintance by the name of Robert Smith who agreed to show him where the mechanics shop was located; that Robert Smith asked him to stop at the bank before proceeding to the mechanics shop; that he drove Robert Smith and Hosie McCloud to the bank and waited outside while they entered the bank; that after Robert Smith and Hosie McCloud exited the bank they re-entered the car and drove away from the bank; and that at no time prior to the attempted bank robbery did he know that Robert Smith and Hosie McCloud intended to rob the bank [R. T. pp. 100-104].

III

ARGUMENT

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE VERDICT

John Leggett's sole contention is that the Government failed to adduce sufficient evidence to show that he was a knowing participant in the attempted bank robbery. It is true that none of the witnesses percipient to the attempted robbery were able to identify John Leggett. Walter Hardy did testify that the fleeing robbers drove off in a white 1956 Oldsmobile [R. T. pp. 36-37]. There is no dispute that the white 1956 Oldsmobile was driven by John Leggett [R. T. p. 68; pp. 91-92; p. 103]. And there is no dispute that Ivan Clark exited John Leggett's car in the parking lot of the bank and that Hosie McCloud exited John Leggett's car near the south entrance to the bank wearing a mask and that when they (Clark and McCloud) re-entered John Leggett's car after exiting the bank they were masked [R. T. pp. 87-92].

It is submitted, on the basis of the foregoing evidence that reasonable minds could find beyond a reasonable doubt that John Leggett was a knowing participant in the attempted bank robbery. However, the Government's proof was not limited to this evidence. F. B. I. Agent Francis A. Calley testified that he interviewed John Leggett and that John Leggett, after relating two conflicting stories, admitted that: On the morning of December 6, 1967, he (John Leggett), Ivan Clark and Hosie McCloud discussed perpetrating a

robbery in the city of Westminster; that the three of them drove by the bank in his car several times and on one occasion Ivan Clark pointed out the bank; that he parked outside the bank while Ivan Clark and Hosie McCloud entered the bank; and that a few moments later Ivan Clark and Hosie McCloud ran from the bank, entered the car and told him to leave the area immediately [R. T. pp. 55-70].

Further, Hosie McCloud, who was called by John Leggett, testified that on the morning of December 6, 1967, Ivan Clark discussed with John Leggett perpetrating a bank robbery in the city of Westminster; that he (McCloud), John Leggett, and Ivan Clark, in John Leggett's car with John Leggett driving, drove by the bank several times; that after Ivan Clark exited John Leggett's car in the parking lot of the bank, he exited the car near the front of the bank; that he and Ivan Clark entered the bank wearing masks; that after exiting the bank, he and Ivan Clark re-entered John Leggett's car still masked and John Leggett drove away from the bank [R. T. pp. 79-92].

The test of the sufficiency of evidence is whether reasonable minds could find that the evidence excludes every hypothesis but that of guilty. Lee v. United States, 376 F. 2d 98 (9th Cir. 1967). In applying this test the court must view the evidence in the light most favorable to the Government. Glasser v. United States, 314 U. S. 60 (1942); Diaz-Rosendo v. United States, 357 F. 2d 124 (9th Cir. 1966). It is respectfully submitted that the evidence meets this standard.

IV

CONCLUSION

For the foregoing reasons, the judgment of conviction should be affirmed.

Respectfully submitted,

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United States Court of Appeals

NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

TERRY LAWRENCE WARD,

Appellant.

No. 22731

UNITED STATES OF AMERICA,

Appellee,

vs.

ORLANDO LOUIE DURAN,

Appellant.

No. 22806

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APPELLANTS' SUPPLEMENTAL BRIEF
REQUESTED BY THE COURT

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IN THE
UNITED STATES COURT OF APPEALS
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ORLANDO LOUIE DURAN,

Appellant.

APPELLANTS' SUPPLEMENTAL BRIEF
REQUESTED BY THE COURT

In accordance with this Court's request, the appellants are submitting this supplemental brief with respect to the issue of the retroactivity of the cases of *Leary v. United States* and *Covington v. United States*, decided May 19, 1969 by the United States Supreme Court, and whether such decisions can be applied to the cases of appellants.

It is clear that in these cases the government relied wholly on the presumption set forth in Section 176a of Title 21, U.S.C., reading as follows:

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

In this brief we are only indirectly concerned with that portion of the Marijuana Tax Act embodied in 26 U.S.C. 4744(a) which the Supreme Court held to be unconstitutional, and under which any conviction prior to the decision would have been void under the general rule as stated by the highest court of New York in *People v. Tannenbaum*, 244 N.E.2d 269, at 270, as follows:

"Where a substantive criminal statute has been held unconstitutional, there is no alternative but to give the decision *retroactive* effect, for the declaration of unconstitutionality is a statement that the defendant has committed no crime. Were the defendant presently imprisoned, he would most certainly be entitled to *habeas corpus* relief." (Emphasis added.)

Before discussing the issue of the retroactive or retrospective operation of various Supreme Court decisions, let us first

examine *Leary*, since *Covington* was based entirely on *Leary*. It would appear from the *Leary* decision that the Court was applying earlier decisions with respect to presumptions contained in criminal statutes to the presumption contained in Section 176a.

The Court relied on the rule in *Tot v. United States*, 319 U.S. 463 (decided in 1943, many years before the instant cases), which rule was adhered to in *United States v. Gainey* (1965) 380 U.S. 63, and *United States v. Romano* (1965) 382 U.S. 136. In *Tot* the Court held the presumption unconstitutional because there was *no rational connection between the fact proved and the ultimate fact presumed*. In *Gainey* the presumption was upheld because it “did no more than accord the evidence, if unexplained, its natural probative force” (380 U.S. at 71). In *Romano* the Court held invalid the presumption that the mere presence of the defendant at an illegal still authorized the jury to infer that he was in possession, custody or control of the still.

Thus, we need not apply *Leary* retroactively in order to obtain a reversal of the conviction of the defendants, as the Court was basing its decision on previously announced rules. In fact, the Court stated:

“We conclude that the ‘knowledge’ aspect of the 176a presumption cannot be upheld without making serious incisions into the teachings of *Tot*, *Gainey* and *Romano*.”

In his concurring opinion, Mr. Justice Black contended the section was unconstitutional and stated:

“Congress has no more constitutional power to tell a jury it can convict upon any such forced and baseless inference than it has power to tell

juries they can convict a defendant of a crime without any evidence at all from which an inference of guilt could be drawn. See *Thompson v. Louisville*, 362 U.S. 199 (1960).”

Since the Court, in deciding *Leary*, relied upon rules it had announced in previous cases, decided long before the instant cases, we contend that this Court should do likewise and reverse the convictions without having to consider the issue of the retroactive operation of *Leary* and *Covington*.

If this Court is of the opinion that there is the issue of retroactivity, we submit that this is one of the instances in which the decision must be held to be retroactive so far as the invalidation of the section 176a presumption is concerned. Let us examine some of the cases wherein retroactive or retrospective application of the Supreme Court’s decisions occurred.

In *Bruton v. United States*, 391 U.S. 123, in the joint trial of two defendants, the confession of one was admitted but the jury was instructed to disregard it as to the co-defendant, in accordance with the rule of *Delli Paoli v. United States*, 352 U.S. 232. However, the Supreme Court overruled *Delli Paoli* and reversed the conviction, thus applying the new rule retroactively.

In *Roberts v. Russell*, 392 U.S. 293, 20 L.Ed.2d 1101, a confession was introduced, made by one defendant, and the trial court instructed the jury to disregard it as against the petitioner [his co-defendant] as in *Bruton*, but petitioner was convicted. After the Tennessee Supreme Court affirmed his conviction, he petitioned in the federal court for *habeas corpus*. The court, relying on *Delli Paoli*, denied his petition and the Court of Appeals affirmed. The Supreme Court

reversed in the light of *Bruton*, thus applying it retroactively to a collateral attack on the conviction. The Court stated:

“We have . . . retroactively applied rules of criminal procedure fashioned to correct serious flaws in the fact-finding process at trial. [Citing many cases decided by the Supreme Court.] Despite cautionary instruction, the admission of a defendant’s confession which implicates a co-defendant is such a serious flaw. The retroactivity of *Bruton* is therefore required; the ‘error went to the basis of fair hearing and trial, because the procedural apparatus never assured the [petitioner] a fair determination’ of his guilt or innocence.”

Clearly, the above applies to the instant cases, as the “procedural apparatus” [*i.e.*, the effect and consequences of the 21 U.S.C. 176a presumption] requires retroactive application of *Leary*, if that be necessary. Moreover, the Court, in *Russell*, further stated that reliance on *Delli Paoli* was not persuasive, as attacks have been made upon it from its inception. In a like manner, as in the instant cases, many attacks have been made on 176a and successful attacks on similar presumptions, as above noted.

The Court further stated:

“And even if the impact of retroactivity may be significant, the constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined.”

In *Gideon v. Wainwright*, 372 U.S. 335 [denial of counsel at trial] ; *Hamilton v. Alabama*, 368 U.S. 52 [denial of counsel at arraignment] ; and *Douglas v. California*, 372 U.S. 353 [denial of appointment of counsel to indigent], the decisions

of the Court were given retroactive operation, because, as stated in *Stovall v. Denno*, 388 U.S. 293, at 298:

“We have also retroactively applied rules of criminal procedure to correct serious *flaws in the fact-finding process* at trial.” (Emphasis added.)

In *Linkletter v. Walker*, 381 U.S. 618, and *Tehan v. Shott*, 382 U.S. 406, the decisions were given prospective operation as to cases *final* at the time, but the Court implied they nevertheless were applicable to cases still pending on direct review—as are the instant cases.

In *Tehan* the Court, in support of its decision, stated at page 408:

“All avenues of direct review of respondent’s conviction were fully foreclosed more than a year before our decision in *Malloy v. Hogan*, *supra* [378 U.S. 1] and almost two years before our decision in *Griffin v. California*, *supra* [380 U.S. 609—comment on failure of defendant to take stand].”

The Court further pointed out that these were state cases in which the state courts for 50 years had relied on *Twining v. New Jersey*, 211 U.S. 78, and to apply *Griffin* retroactively “would have an impact . . . so devastating as to need no elaboration.”

This consideration is not present in the instant cases, not only because the states are not involved in new rules making them subject to the Amendments of the Constitution through the Fourteenth Amendment, but also because, herein, only a federal statute is involved. Furthermore, the cases herein are not final but are still open on direct appeal.

In *Linkletter* it was held that the *exclusionary rule* of *Mapp v. Ohio*, 367 U.S. 643, should not be given retroactive

effect because prior to *Mapp* such exclusionary rule did not exist for the states. The Court pointed out that in a number of cases it had applied rules retroactively, namely, in *Gideon v. Wainwright*, *supra*; *Doughty v. Maxwell*, 376 U.S. 202; and *Griffin v. Illinois*, 351 U.S. 12. It also applied retroactively the rules respecting coerced confessions, to wit, *Jackson v. Denno*, 378 U.S. 368 [writ of *habeas corpus* granted]; *McNerlin v. Denno*, 378 U.S. 575, and *Reck v. Pate*, 367 U.S. 433 [coerced confession—*habeas corpus* granted].

In *Katz v. United States*, 389 U.S. 347, the Supreme Court, in reversing the conviction of petitioner, announced two new rules contrary to its line of earlier decisions, to wit: (a) that the reach of the Fourth Amendment cannot turn upon the presence or absence of *physical intrusions*; and (b) that the Fourth Amendment protects persons as well as places.

In *Desist v. United States* (Mar. 24, 1969) 37 U.S. Law Week 4225, the Court held that the new rules announced in *Katz*, in which previous decisions of the Court were overruled, should be given only prospective application. The Court stated:

“While decisions before *Katz* may have reflected growing dissatisfaction with the traditional tests of the constitutional validity of electronic surveillance, the Court consistently reiterated those tests and *declined* invitations to abandon them.” (Emphasis added.)

The Court further pointed out that it had accorded only prospective operation to the exclusionary rule, because the exclusionary rule was but a procedural weapon that had no bearing on guilt and the fairness of the trial was not under attack.

The Court further stated that it had abandoned the approach in *Linkletter* and *Tehan* as to prospective application, in deciding *Johnson v. New Jersey*, 384 U.S. 719, where in it had stated at page 733:

“ . . . [O]ur holdings in *Linkletter* and *Tehan* were limited to convictions which had become final at the time *Mapp* and *Griffin* were rendered. Decisions prior to *Linkletter* and *Tehan* had already established without discussion that *Mapp* and *Griffin* applied to cases still on direct appeal at the time they were announced.”

Thus, in *Desist*, the Court's latest expression on the issue of retroactivity, it decided that prospective operation of a decision which overturned old established rules was applicable only to those cases that were already final on appeal at the time of the decision. The instant cases are before this Court, and, not yet being final on appeal, the principle of prospective application should not be applied to them.

In analyzing the cases above mentioned and others, including some of the concurring and dissenting opinions thereof, we believe that certain principles underly the determination by the Supreme Court whether a particular decision should have retroactive or only prospective application, and we briefly summarize them as follows:

1. Retroactive application must be given where the Court's decision seeks to correct serious flaws existing in the fact-finding process which deprive the defendant of a fair determination of his guilt or innocence. This is the situation in the instant cases, because the defendants' guilt or innocence had no rational connection with the ultimate fact presumed. Thus, retroactive application must be given to *Leary*.

2. Prospective application is given to decisions pertaining to new rules prohibiting the use of unlawfully obtained evidence, because the new exclusionary rules are but procedural weapons having no bearing on guilt and the fairness of the trial is not under attack. Primarily involved are the methods of police in the securing of evidence.

3. Even in such cases where prospective application is determined, such prospective operation is applicable primarily—if not exclusively—to cases then final on appeal, especially in state cases.

4. Prospective operation may occur when the new rules announced are contrary to a line of decisions previously rendered by the Supreme Court, and in its latest decision it overrules the earlier decisions, which have been relied upon by police and courts in a great number of cases—especially in state cases.

5. Where the particular decision nullifies and invalidates a criminal statute (or a pertinent portion thereof) under which the defendant was convicted, the decision must be applied retroactively. This must be distinguished from those instances where the convictions take place due to the use of evidence previously authorized by court decisions, independent of statutes.

6. If there are decisions of the Supreme Court previously rendered that portend, foreshadow, indicate or support the latest decision, the latter may be given retroactive effect. As the Court in *Leary* indicated, its decision was a clarification or extension of rules announced in previous cases wherein presumptions similar to that of 21 U.S.C. 176a were involved.

CONCLUSION

In conclusion, we respectfully submit that the decisions in *Leary* and *Covington* should be applied to the instant cases, and the judgments of conviction reversed, for the following reasons, among others:

1. The presumption under 21 U.S.C. 176a constituted a serious flaw in the fact-finding process, because the presumption has no rational connection with the determination of the guilt of defendants. In fact, Mr. Justice Black in his concurring opinion in *Leary* stated it was unconstitutional.

2. The Supreme Court in deciding *Leary* did not have to overrule any previous decisions by it on the subject; it merely extended to 21 U.S.C. 176a its rulings in previous cases where similar presumptions were involved. Thus, there had been no period of reliance on previously announced rules by the Supreme Court.

3. *Leary* did not involve any exclusionary rules or rules of police administration and methods, made applicable to the states under the Amendments of the Constitution via the Fourteenth Amendment.

4. The instant cases are not final, being still open on appeal, and hence *Leary* is applicable to them, since most cases of prospective operation have been limited to cases already final on appeal, especially state cases.

Therefore, we urge that this Court reverse the convictions of appellants.

Respectfully submitted,

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DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 315 Third Street, Huntington Beach, California 92646, that on JULY , 1969, I served the within APPELLANTS' SUPPLEMENTAL BRIEF REQUESTED BY THE COURT (CASE NO. 22731 and CASE NO. 22806) on the following named party by depositing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said party at the address as follows:

UNITED STATES ATTORNEY
UNITED STATES COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JULY , 1969, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

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IN THE UNITED STATES COURT OF APPEALS
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ORLANDO L. DURAN,

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VS.

UNITED STATES OF AMERICA,

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WM. B. LUCK, JR.

APPELLEE'S BRIEF

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IN THE UNITED STATES COURT OF APPEALS
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ORLANDO L. DURAN,

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vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATUTE INVOLVED

Title 21, United States Code, Section 176(a), provides
in pertinent part as follows:

" . . . whoever, knowingly, with intent to
defraud the United States, . . . receives, con-
ceals, buys, sells, or in any manner facilitates
the transportation, or sale of such marihuana after
being imported or brought in, knowing the same to
have been imported or brought into the United
States contrary to law . . . shall be imprisoned
not less than five or more than twenty years and,
in addition, may be fined not more than \$20,000.

[R. T. 46]. Defendant Duran told Lusardi that the kilos in the garage were wrapped differently because they had opened them up to ascertain whether the marihuana had been either "sugared or honeyed down" [R. T. 46]. Defendant Duran then unlocked and opened the garage door [R. T. 46, 70]. In the garage Agent Lusardi examined a box containing approximately 14 kilograms of marihuana. He then told defendants Ward and Duran he was satisfied and would get his partner and load the marihuana into his vehicle [R. T. 46].

Agent Lusardi and Miser then returned to the government car. Agent Lusardi told Agent Walker he had seen the marihuana and told him to drive to the backyard. Agent Walker drove up the driveway where defendant Duran instructed him to back his car next to the Volkswagen and to shut off the lights of his vehicle [R. T. 79]. Agent Lusardi then placed Miser under arrest, while Agent Walker placed defendant Duran and defendant Ward under arrest [R. T. 47-48, 60-62, 79].

III

A. THE EVIDENCE IS SUFFICIENT TO
SHOW THAT DURAN WAS IN POSSESSION
OF THE MARIHUANA CHARGED IN
COUNT I OF THE INDICTMENT.

Section 176(a), Title 21, United States Code, provides that proof of possession of marihuana is sufficient evidence to authorize conviction unless that possession is explained to

the satisfaction of the jury.

"Possession" sufficient to support the inference of importation and knowledge provided in Section 176(a) of Title 21, United States Code, means having marihuana under one's dominion and control to such a degree as to have the power of disposal. Such possession can be constructive and need not be exclusive, but may be joint.

Rodella v. United States, 286 F.2d 306, 311

(9 Cir. 1960), cert. den. 365 U.S. 889 (1961);

Dolliver v. United States, 379 F.2d 307

(9th Cir. 1967).

Actual or constructive possession may be proved by circumstantial evidence.

Cellino v. United States, 276 F.2d 941

(9th Cir. 1960).

Whether or not defendant Duran spoke to Agent Lusardi at the outset of the negotiations, it is clear from the evidence that defendant Duran had joint dominion and control over the marihuana in the trunk of the Volkswagen which is the subject of Count I. After Agent Lusardi went to the backyard with defendants Duran and Ward, defendant Duran told defendant Ward to open the trunk of the Volkswagen to show Agent Lusardi the marihuana [R. T. 45]. Defendant Ward complied [R. T. 45].

As Lusardi was examining the marihuana, defendant Duran told the agent that if he wanted to take a closer look at the marihuana he could take several kilos into the house to look at

them in the light [R. T. 45]. He also stated that there were 46 kilos in the trunk [R. T. 45-46].

The above evidence shows that Duran had knowledge of the location of the marihuana in the car and a knowledge of the precise amount. Also apparent is his desire and ability to facilitate the sale of it. The instruction to defendant Ward and defendant Ward's compliance with those instructions further show dominion and control over the contraband. It also must be pointed out that near the end of the entire transaction Duran instructed Agent Walker to back his car next to the Volkswagen, presumably to effect a transfer of the 46 kilos from Ward's car to the agent's [R. T. 79].

Appellant relies on Delgado v. United States, 327 F.2d 641 (9th Cir. 1964). However, in Delgado there was no evidence presented other than the fact that marihuana was found in the drawer of a nightstand at the foot of a bed occupied by the defendants. In this case, defendant Duran's statements establish his joint dominion and control.

B. THE EVIDENCE IS SUFFICIENT TO
SHOW THAT DURAN WAS IN POSSESSION
OF THE MARIHUANA CHARGED IN
COUNT II OF THE INDICTMENT.

After Agent Lusardi had seen the marihuana in the trunk of the car, defendant Duran told Lusardi there were 46 kilos of marihuana in the car and 14 more in the garage [R. T. 45-46].

The latter 14 kilos are the subject of Count II of the indictment [R. T. 47]. Defendant Ward told defendant Duran to open the garage. Defendant Duran then went to the garage, unlocked the door with a key from his key ring, and opened the garage door to show Agent Lusardi the marihuana. At this time Duran told Lusardi that the kilos in the garage were wrapped differently because they had previously been opened in order to ascertain whether the marihuana had been "sugared or honeyed down" [R. T. 46].

The fact that Duran gained access to the garage with his key indicates that he had control over that area.

"Proof that one had exclusive control and dominion over property on or in which contraband narcotics are found is a potent circumstance tending to prove knowledge of the presence of such narcotics and control thereof."

Evans v. United States, 257 F.2d 121, 128
(9th Cir. 1958).

His statements to the agent further indicate that he had detailed knowledge of the quantity and quality of the marihuana by reason of his previous examination of it. Certainly reasonable minds could also conclude that he had the desire and power to dispose of it.

Klepper v. United States, 331 F.2d 694
(9th Cir. 1964);

Rodella, supra, at p. 31;

Cellino, supra.

CONCLUSION

From the foregoing facts it can be seen that there was ample evidence, taking the view most favorable to the government, for reasonable minds to conclude that defendant was in possession of the marihuana involved in both counts. Therefore, the verdict of the jury as the sole triers of fact must be sustained.

Fraker v. United States, 294 F.2d 859

(9th Cir. 1961).

Respectfully submitted,

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United States of America.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAR 10 1969

UNITED STATES OF AMERICA,

Appellee,

vs.

No. 22,731

TERRY LAWRENCE WARD,

Appellant.

UNITED STATES OF AMERICA,

Appellee,

vs.

No. 22,806

ORLANDO LOUIE DURAN,

Appellant.

PETITION FOR REHEARING

FILED

MAR 23 1968

U.S. COURT OF APPEALS

ARTHUR LEWIS

205 South Broadway, Suite 802
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Los Angeles, California 90012
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Attorneys for Appellants

1 UNITED STATES COURT OF APPEALS

2 FOR THE NINTH CIRCUIT

3
4 UNITED STATES OF AMERICA,)

5 Appellee,)

6 vs.)

No. 22,731

7 TERRY LAWRENCE WARD,)

8 Appellant.)

9
10 UNITED STATES OF AMERICA,)

11 Appellee,)

12 vs.)

No. 22,806

13 ORLANDO LOUIE DURAN,)

14 Appellant.)

15
16 PETITION FOR REHEARING

17
18 Appellants herein petition this Court for a rehearing
19 and reconsideration of the judgment of the Court entered on or
20 about November 29, 1968, on the ground that significant Consti-
21 tutional questions were not adequately considered.

22
23 In this regard Appellants respectfully direct this
24 Court's attention to the order of the United States Supreme
25 Court of June 10, 1968, granting Certiorari in the matter of
26 Leary vs. United States.



1 Certiorari therein was granted, limited to Questions
2 I and IV, presented by the petition therein which read as
3 follows:

4 "I. Whether the registration and tax provisions
5 in 26 U.S.C. Sections 4741(a), 4742 and 4744(a),
6 as applied to Petitioner, violate his privilege
7 against self incrimination protected by the Fifth
8 Amendment to the United States Constitution and
9 his rights thereunder as amplified by this Court
10 in three recently decided cases: Marchetti v.
11 U.S., 390 U.S. 39 (1968); Grosso v. U.S., 390
12 U.S. 62 (1968); and Haynes v. U.S., 390 U.S. 85
13 (1968)."

14 "IV. Whether Petitioner was denied due process
15 under the Fifth Amendment by the application,
16 under the circumstances of this case, of the
17 provisions of 21 U.S.C. § 176a, providing that
18 an inference may be drawn respecting the illegal
19 origin and nature of marihuana solely from
20 possession thereof."

21
22 In view of the consideration by the United States
23 Supreme Court of these vital Constitutional issues which are
24 also present in the instant case, Appellants herein respect-
25 fully request this Honorable Court to stay the mandate herein

26 *****

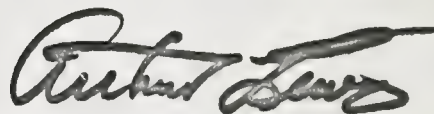


1 pending decision of the matter by the United States Supreme
2 Court.
3

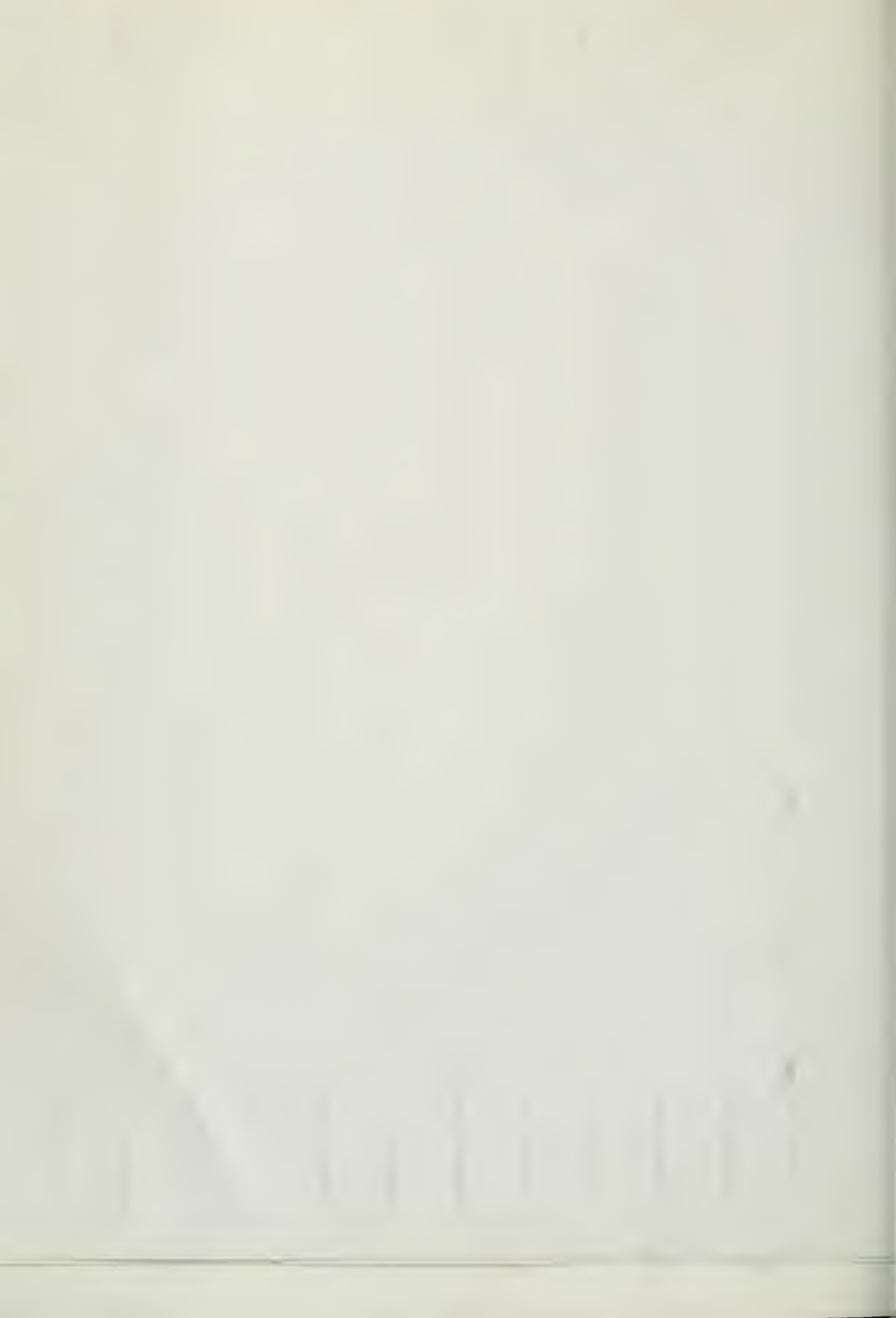
4 Respectfully submitted,

5 
6

7 Harvey Byron
8 Attorney for Appellant, Terry
9 Lawrence Ward
10

11 
12

13 Arthur Lewis
14 Attorney for Appellant, Orlando
15 Louie Duran
16
17
18
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20
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26



AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, MARIA ADELINA PERIZ, declare:

I am a citizen of the United States, over 18 years of age, and not a party to the within cause; my business address is 205 South Broadway, Suite 802, Los Angeles, California 90012. On December 17, 1968, I served a copy of the attached PETITION FOR REHEARING on each of the following by placing same in an envelope addressed, respectively, as follows:

William Matthew Byrne
1200 U.S. Court House
312 North Spring Street
Los Angeles, California 90012

Michael D. Nasatir
1200 U.S. Court House
312 North Spring Street
Los Angeles, California 90012

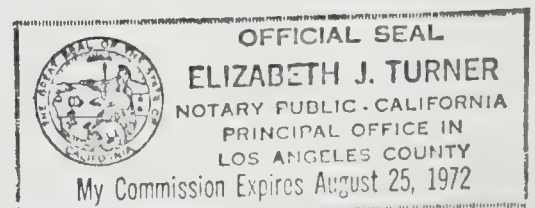
United States Court of Appeals
Ninth Circuit
P. O. Box 547
San Francisco, California 94101
Attention: William B. Luck

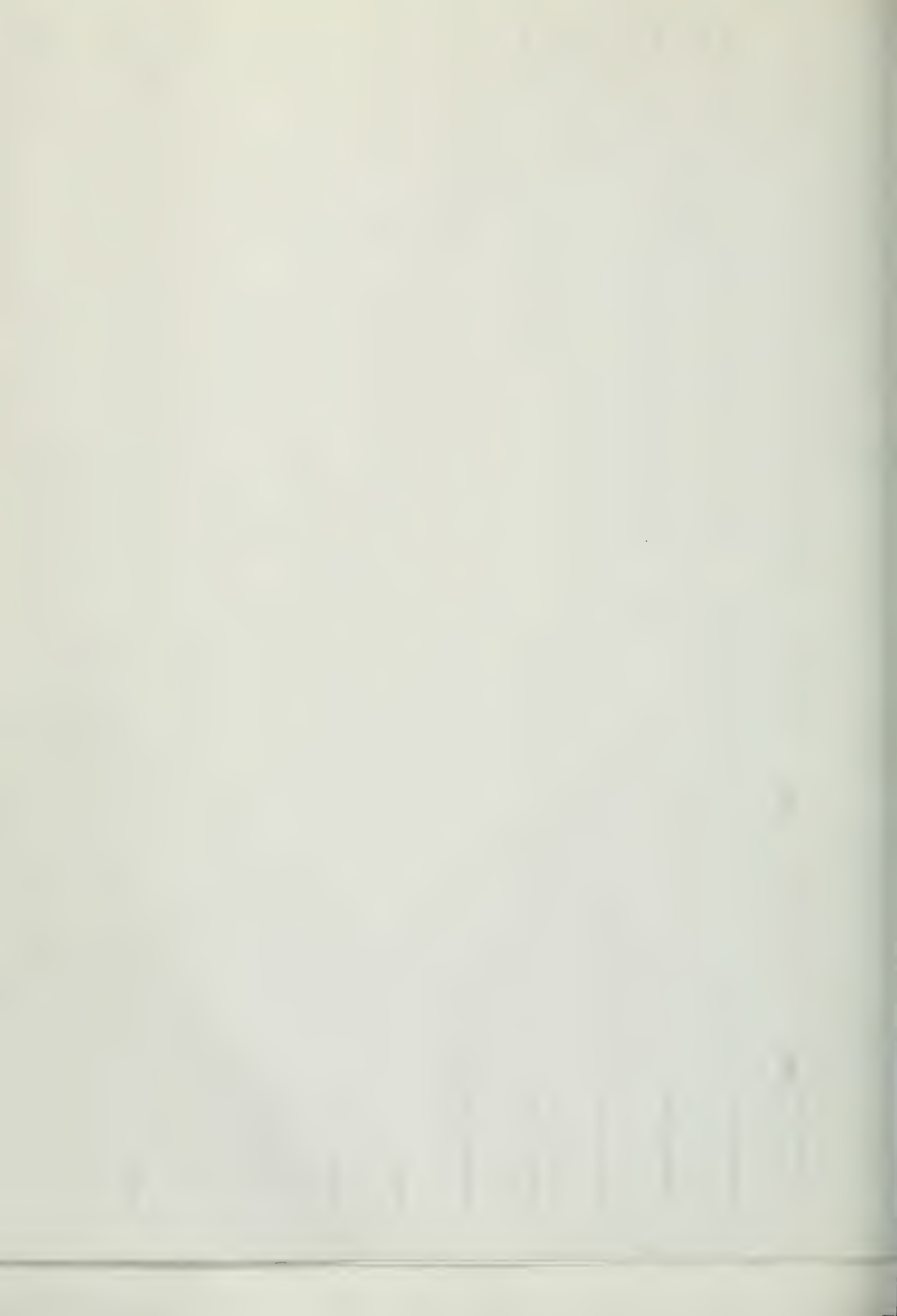
Each of said envelopes was then, on December 17, 1968, sealed and deposited in the United States Mail at Los Angeles, California, the county in which I am employed, with postage thereon fully prepaid.

Maria Adelina Perez
MARIA ADELINA PEREZ

Subscribed and sworn to before me
this 17th day of December, 1968.

Elizabeth J. Turner
Notary Public in and for said
County and State





UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CAROL J. WINTHAL,
MARTIN J. WINTHAL,

Appellants,

vs.

MANLEY BOWLER,

Appellee.

APR 2 1969

No. 22808 ✓

APPELLEE'S BRIEF

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FILED

MAR 27 1969

WM. B. LUCK, CLERK

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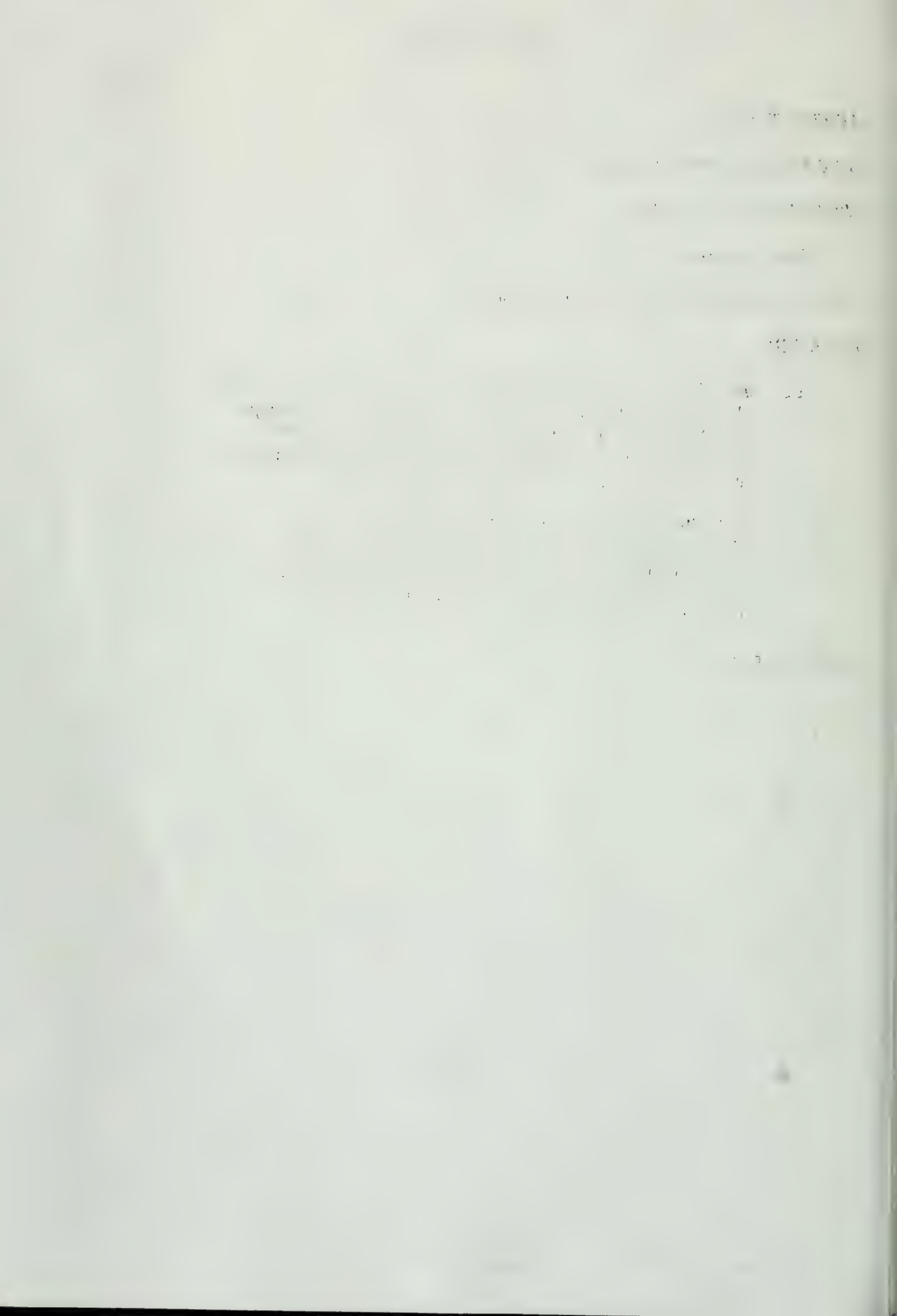
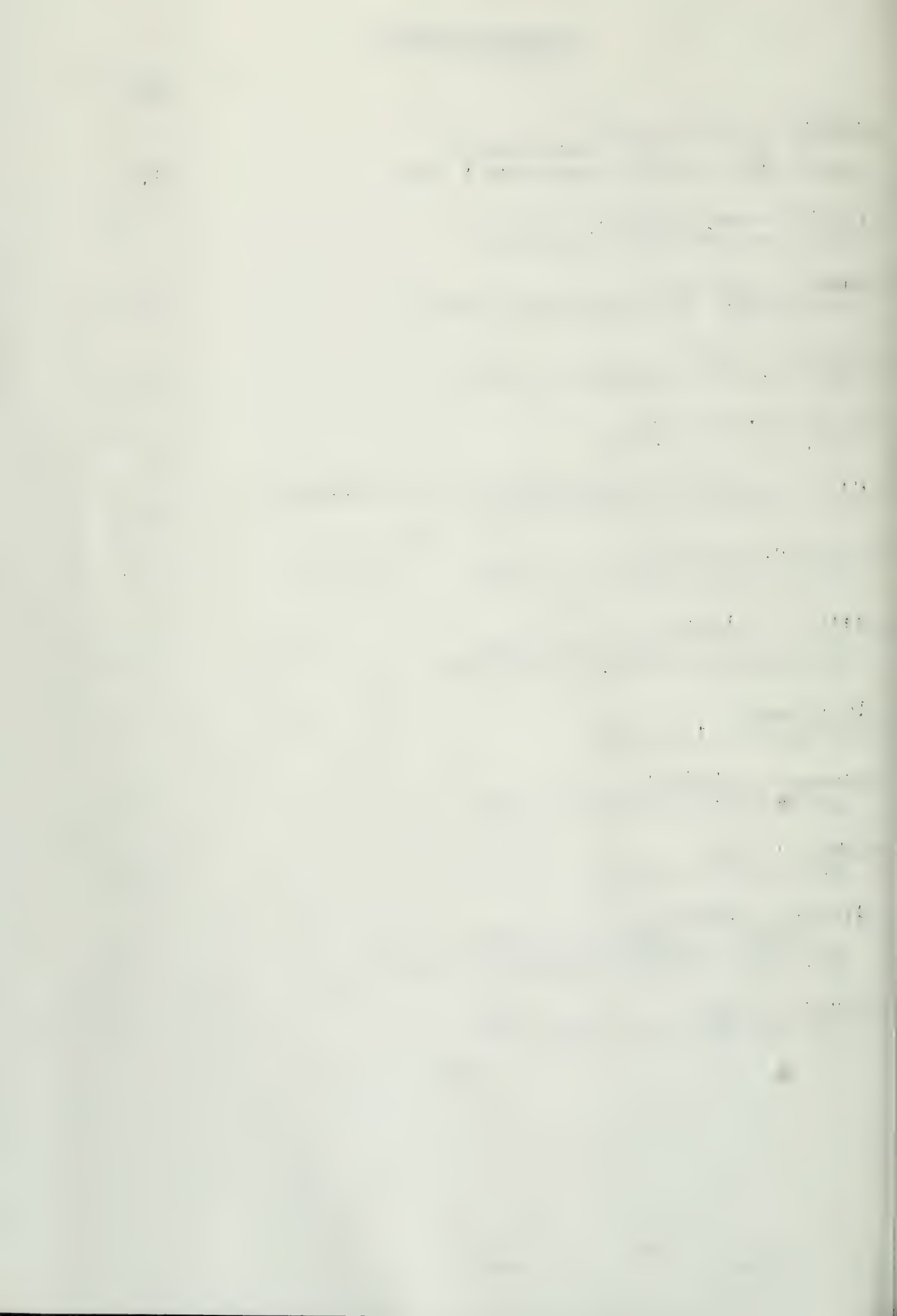


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Federal Rules of Appellate Procedure

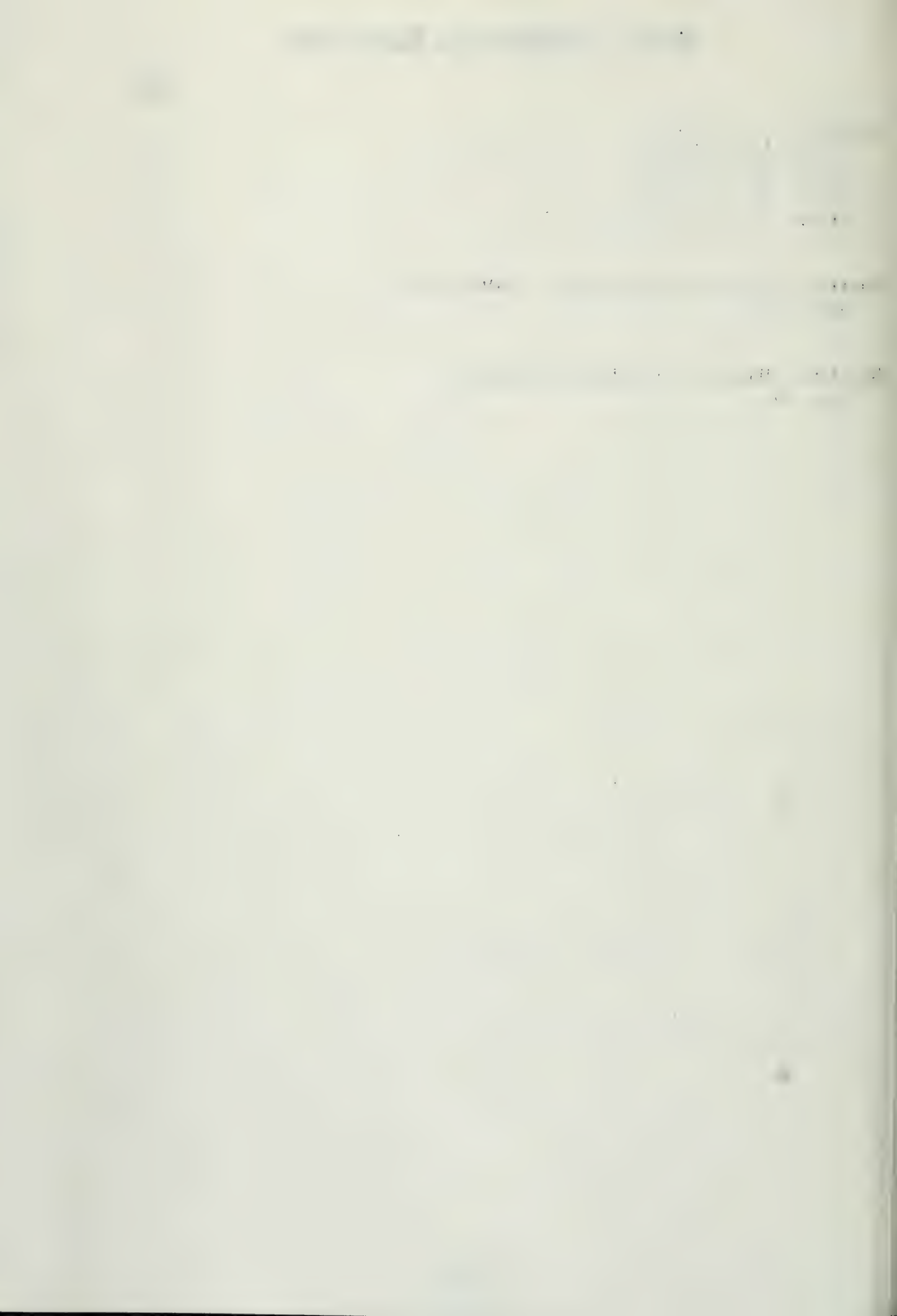
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Federal Rules of Civil Procedure

Rule 8a

2



UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CAROL J. WINTHAL,)	
MARTIN J. WINTHAL,)	
)	
Appellants,)	
)	
vs.)	No. 22808
)	
MANLEY BOWLER,)	
)	
Appellee.)	
<hr/>		

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court for the Northern District of California to entertain appellants' complaint was conferred by Title 42, United States Code sections 1981 et seq., and Title 28, United States Code section 1343. The jurisdiction of this Court is conferred by Title 28, United States Code section 1291.

STATEMENT OF THE CASE

This is an appeal from the February 28, 1968 order of the District Court which (1) denied Martin Winthal's motion to enjoin the California Adult Authority from taking further actions with regard to him and (2) dismissed the action as to the defendant Manley Bowler, a member of the California Adult Authority. Appellants' first papers in this case were filed May 9, 1967 and

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dismissed October 6, 1967 by the District Court under Rule 8a, Federal Rules of Civil Procedure, with leave to file an amended complaint.

Early in December, 1967, appellants filed an amended complaint and an application for an injunction against the California Adult Authority. On December 13, 1967 the District Court issued an order to the defendants to show cause on January 19, 1968 why a permanent injunction should not issue. On January 11, 1968 the defendants Bowler and the California Adult Authority filed a return to the order to show cause and on January 18, 1968 plaintiffs filed a traverse. The matter was argued and submitted January 19, 1968.

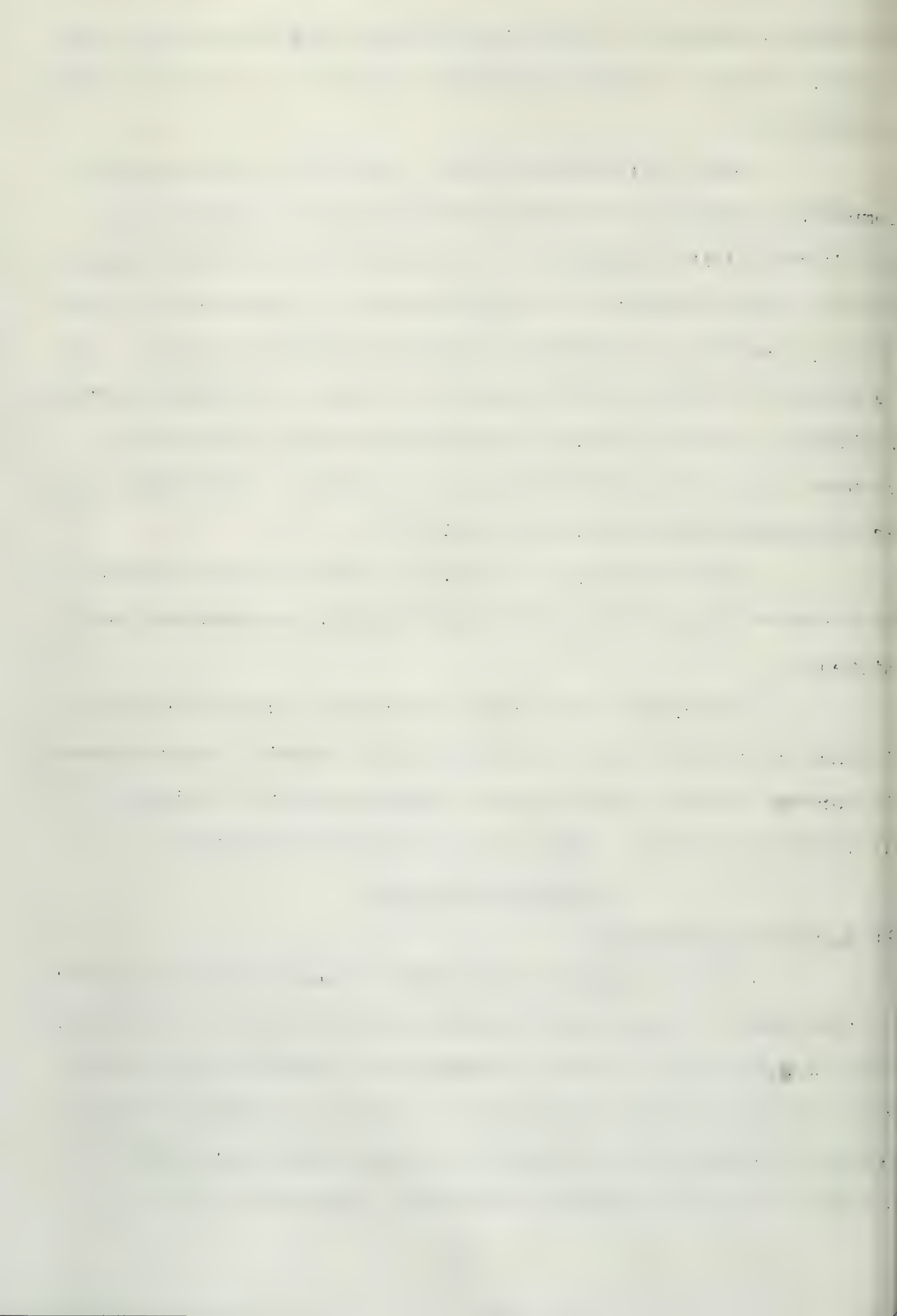
On February 8, 1968 Manley Bowler noticed a motion to dismiss the action as to himself which was argued and submitted.

On February 28, 1968 the District Court denied the injunction against the California Adult Authority and discharged its order to show cause and also granted Bowler's motion to dismiss the action. This is the order appealed from.

STATEMENT OF FACTS

Preliminary Statement

It would appear unnecessary for appellee to set forth a statement of facts since appellants have declined to do so in the Opening Brief. These circumstances ordinarily would call for a motion before this Court to strike Appellants' Opening Brief by reason of its failure to have complied with Rule 28, Federal Rules of Appellate Procedure. Experience teaches,



however, that little would be accomplished by such a motion in view of appellants' having consistently filed papers, both in the District Court and in this Court, which are virtually incomprehensible.^{1/}

Accordingly, we set forth here no detailed statement of facts because the issues and discussion set forth in Appellants' Opening Brief do not require it. Each of the matters raised in the Opening Brief have been well settled by the opinions of this Court contrary to appellants' position. We also point out here that, of course, this brief is not addressed to the following points in Appellants' Opening Brief which relate exclusively to the federal defendants:

- A. Under "Questions Involved" we do not address ourselves to paragraph numbered four (Appellants' Opening Brief, p. 3).
- B. Under "Specifications of Error" we do not address ourselves to paragraph numbered three (Appellants' Opening Brief, p. 4).
- C. Under "Argument" we do not address ourselves to paragraph numbered six (Appellants' Opening Brief,

1. Our Return to the Order to Show Cause and Points and Authorities in Opposition to the Petition for Permanent Injunction, filed in the District Court July 11, 1968, sets forth our understanding and our detailed response to appellants' application for the injunction. Similarly, our Points and Authorities in Support of the Motion to Dismiss as to Manley Bowler contains our understanding of the amended Complaint and our detailed response to it. In view of the nature of Appellants' Opening Brief, however, we decline to go into this material, the discussion of which would be mainly repetitive of the above documents which are already part of the record on appeal.

ISSUES PRESENTED FOR REVIEW

1. Whether the federal District Court may enjoin the California Adult Authority from enforcing California's Indeterminate Sentence Law under the authority delegated it by the Legislature.
2. Whether the members of the California Adult Authority are individually liable under the Civil Rights Act for acts done in their official capacity.
3. Whether California's Indeterminate Sentence Law is unconstitutional.

ARGUMENT

I

APPELLANTS HAVE NEVER STATED JUSTIFICATION FOR ENJOINING THE ADULT AUTHORITY FROM ENFORCING CALIFORNIA'S INDETERMINATE SENTENCE LAW IN EXERCISE OF THE AUTHORITY DELEGATED IT BY THE LEGISLATURE.

The first and third issues as set forth above are inextricably bound together. California's Indeterminate Sentence Law is indisputably valid under the United States Constitution as is the delegation of power to fix and refix terms and grant and revoke parole. Dreyer v. Illinois, 187 U.S. 71, 83, 84 (1902); Bennett v. California, ___ F.2d ___ (9th Cir. 1969) (No. 21,952, decided January 9, 1969, and the cases there cited). Accordingly, such conduct of the California Adult Authority may not be enjoined for the simple reason it is not invalid under federal law.

Where a state prisoner attacks the revocation of his

parole on federal constitutional grounds, a remedy must be sought by way of a petition for writ of habeas corpus. Cf. Dunn v. California Department of Corrections, 401 F.2d 340, 342 (9th Cir. 1968). Neither this Court nor the District Court may grant him relief in this action because to do so would be to treat the instant action as one for a writ of habeas corpus; such writ could not properly issue because Martin Winthal's custodian is not a party to the action. See Gaito v. Strauss, 368 F.2d 787, 788 (3rd Cir. 1966), cert. denied, 386 U.S. 977 (1967). This Court has held that an action under the Civil Rights statutes may not be used as a substitute for habeas corpus. DeWitt v. Pail, 366 F.2d 682 (9th Cir. 1966). This is particularly true where to use a civil rights action as a substitute for habeas corpus would operate to allow the plaintiff to avoid the exhaustion of state remedies requirements of Title 28, United States Code section 2254. Johnson v. Walker, 317 F.2d 418, 419-20 (5th Cir. 1963); Davis v. Maryland, 248 F.Supp. 951, 952-53 (W.Dis. Md. 1965). Such a remedy is presently available upon proper grounds under California state law which provides a means to determine whether parole has been improperly revoked. See, e.g., In re Hall, 63 Cal.2d 115 (1965).^{2/}

Appellants also failed to set forth any justification

2. It should be noted here that in Civil Action No. 45793 in the files of the United States District Court for the Northern District of California, Martin Winthal unsuccessfully petitioned for a writ of habeas corpus on the grounds that his state court convictions are invalid. This petition was dismissed by order of the court signed November 9, 1966 by Chief Justice Harris on the ground that Winthal had failed to comply with Title 28, United States Code section 2254.

for enjoining the California Adult Authority from acting in Martin Winthal's case on the grounds that he need not be permitted counsel at a parole revocation hearing, and indeed need not be given the opportunity to appear at all. The rights granted a criminal defendant at a probation hearing under Mempa v. Rhay, 389 U.S. 128 (1967), are inapplicable to state parole revocation hearings. This point has been expressly decided by this Court in Dunn v. California Department of Corrections, 401 F.2d 340, 342 (9th Cir. 1968) and in Eason v. Dickson, 390 F.2d 585, 588-89 (9th Cir. 1968).

II

THE MEMBERS OF THE CALIFORNIA ADULT AUTHORITY ARE NOT SUBJECT TO A SUIT FOR DAMAGES UNDER THE FEDERAL CIVIL RIGHTS ACT FOR ACTS DONE IN THEIR OFFICIAL CAPACITY.

It is well settled that state agencies such as the California Adult Authority are not "persons" within the meaning of the Civil Rights Act. Bennett v. California, supra; Clark v. Washington, 366 F.2d 681 (9th Cir. 1966); Sires v. Cole, 320 F.2d 877, 879 (9th Cir. 1963). The actions of Manley Bowler of which Martin Winthal complains fall within the quasi-judicial or discretionary duties and functions vested in him by state law and are alleged to have been taken in his official capacity. As to such actions, it is well settled by the decisions of this Court that the members of the Adult Authority are immune from suit for damages under the Civil Rights Act. Bennett v. California, supra; Silver v. Dickson, ____ F.2d ____ (9th Cir. 1968) (No. 22129, decided November 8, 1968).

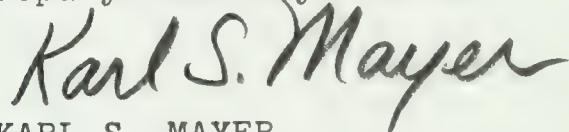
CONCLUSION

For the aforementioned reasons the order of the District Court, dated February 28, 1968, denying appellant's motion for a permanent injunction against the California Adult Authority and dismissing the action as to the defendant Manley Bowler should be affirmed.

Dated: March 26, 1969

THOMAS C. LYNCH, Attorney
General of California

JOHN T. MURPHY
Deputy Attorney General

A handwritten signature in cursive script that reads "Karl S. Mayer".

KARL S. MAYER
Deputy Attorney General

Attorneys for Appellee

mhm
CRSF
002270

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAR 10 1969
MAR 1969

CAROL J. WINTHAL,
MARTIN J. WINTHAL,

Appellants,

versus

MANLEY BOWLER,

Appellee.

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MARTIN J. WINTHAL,

Appellants,

versus

S. A. BERRYMAN, ROSS DUNLEVY, and
STANLEY FOGLER,

Appellees.

FILED

MAR 1 1969

MAR 1 1969

APPELLANTS' OPENING BRIEF

On Appeal from the United States District Court for the
Northern District of California

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Attorney for Appellants



UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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versus

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No. 22,808

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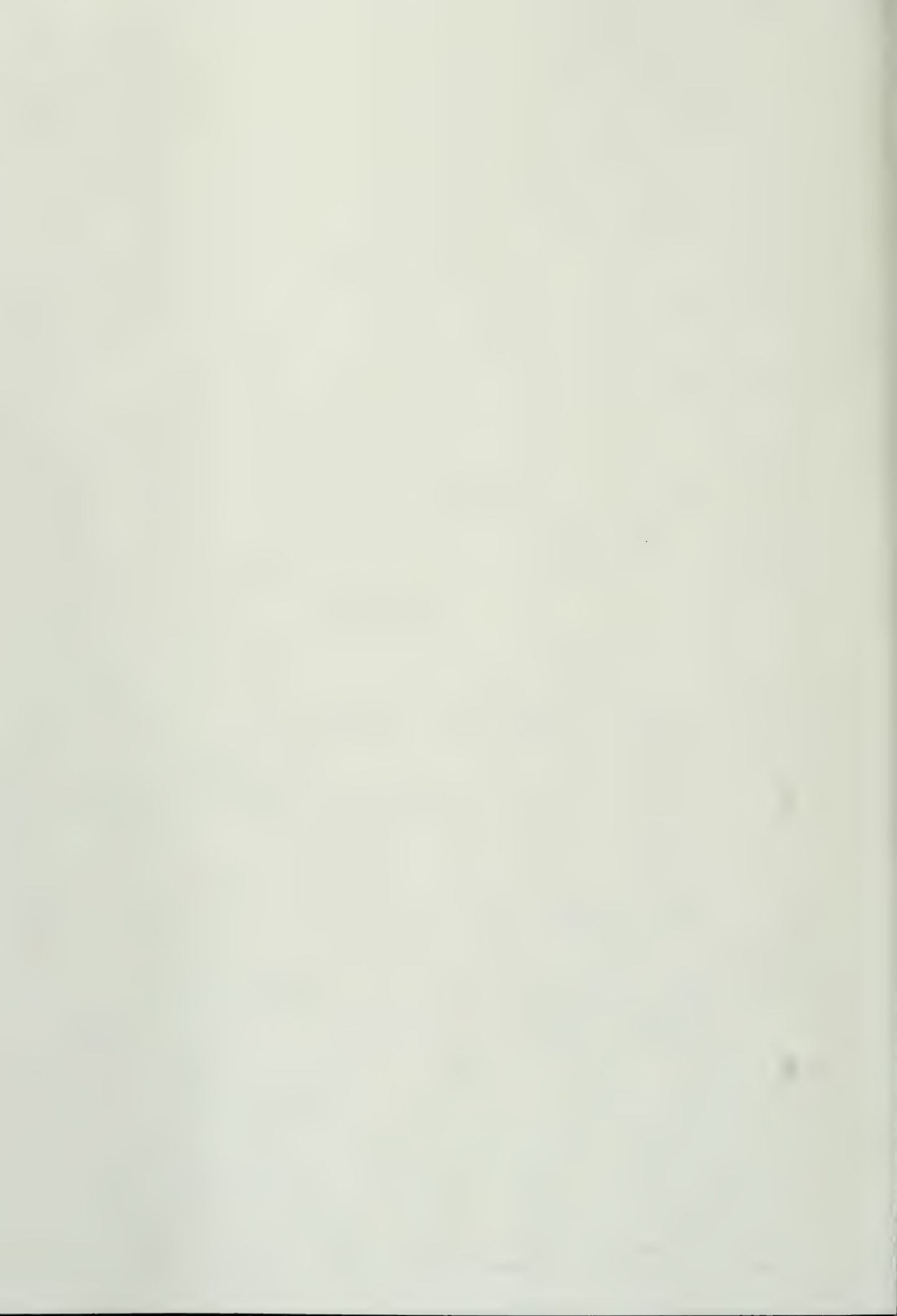
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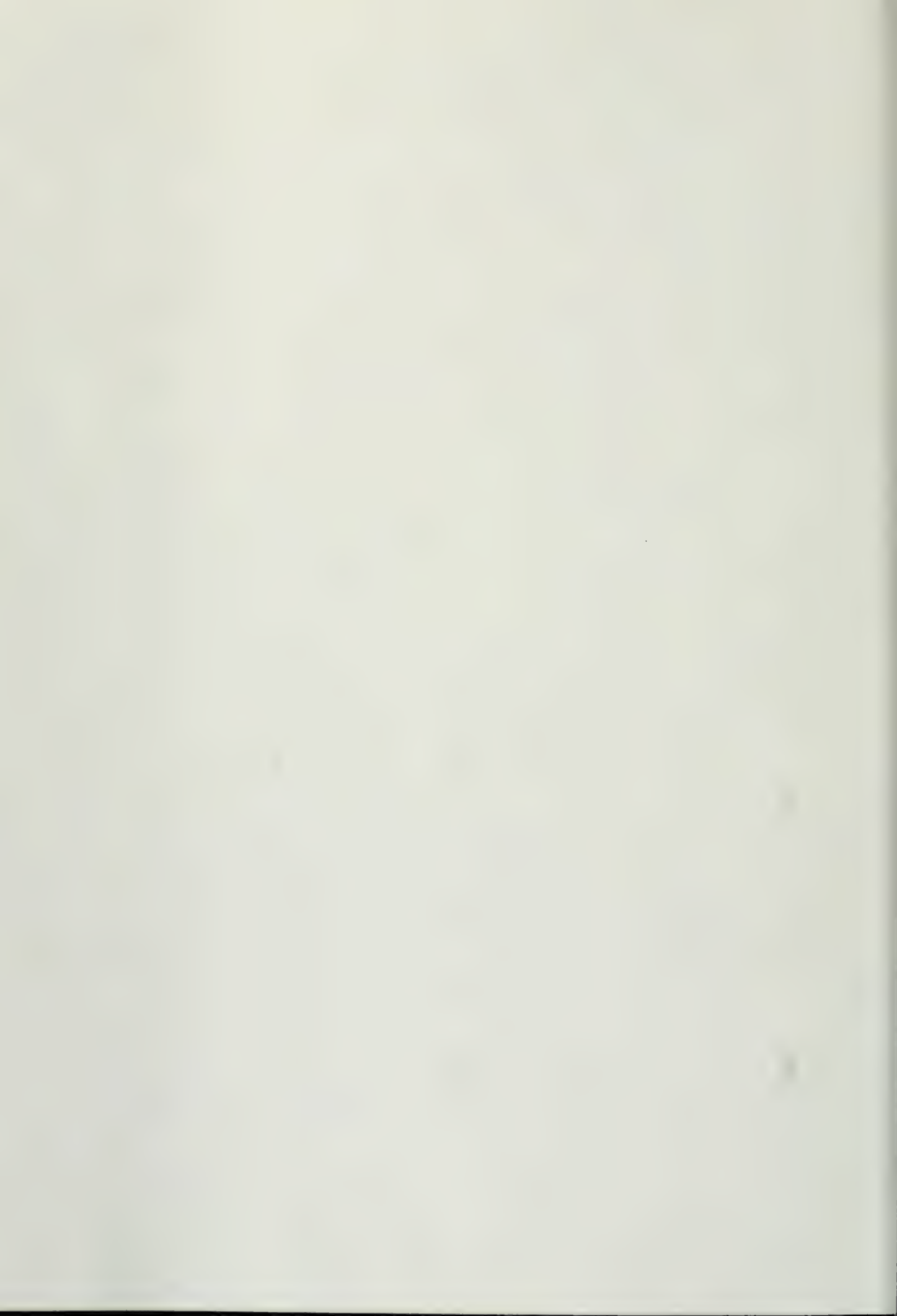
APPELLANTS' OPENING BRIEF

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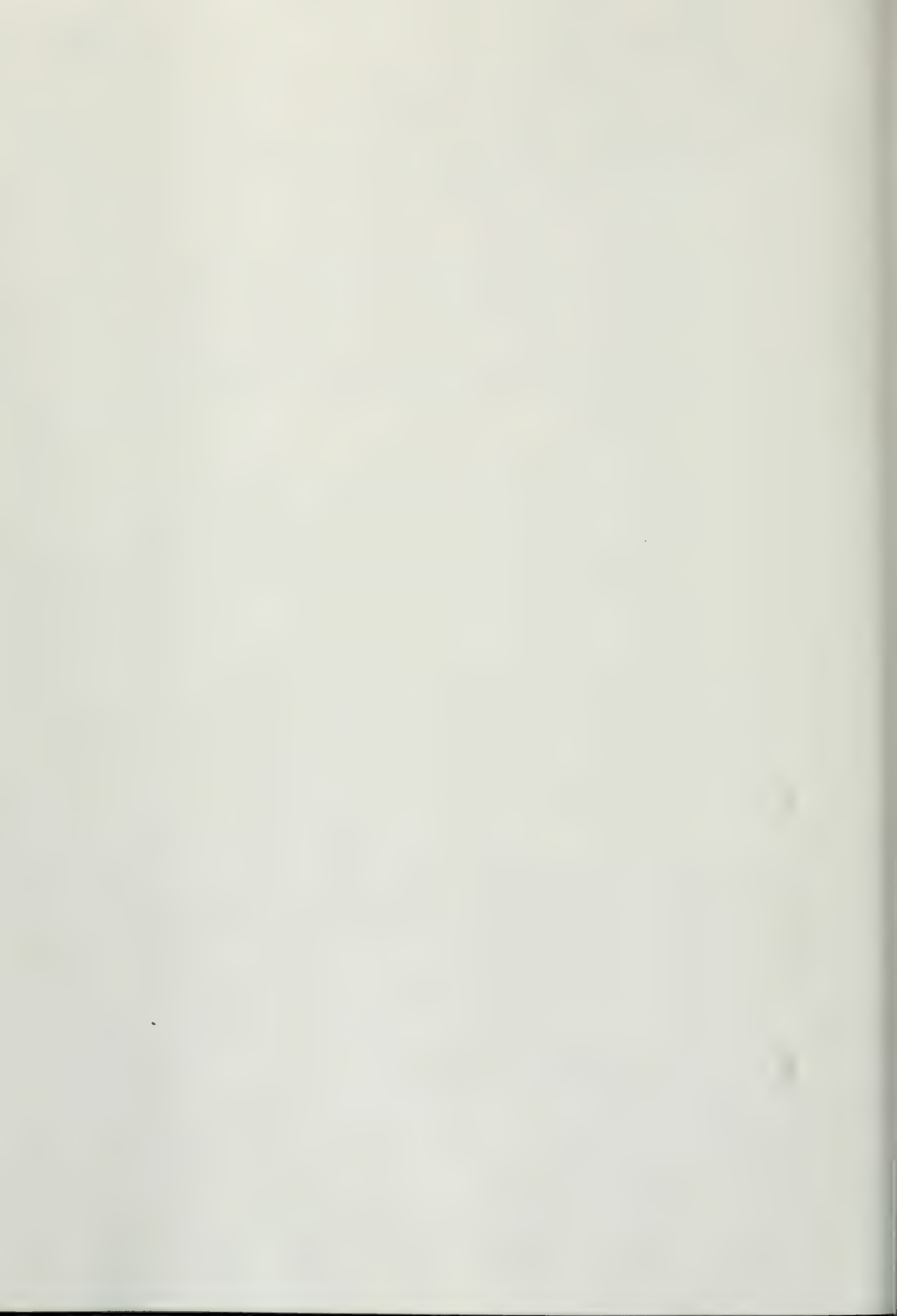


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2. The statutory presumption set forth in s. 3064, Cal. Penal Code, of fugitivity and criminality inferred from an ex parte suspension or revocation of the parole of any prisoner is unconstitutional for lack of a rational connection between the fact presumed and the fact proved	4-5

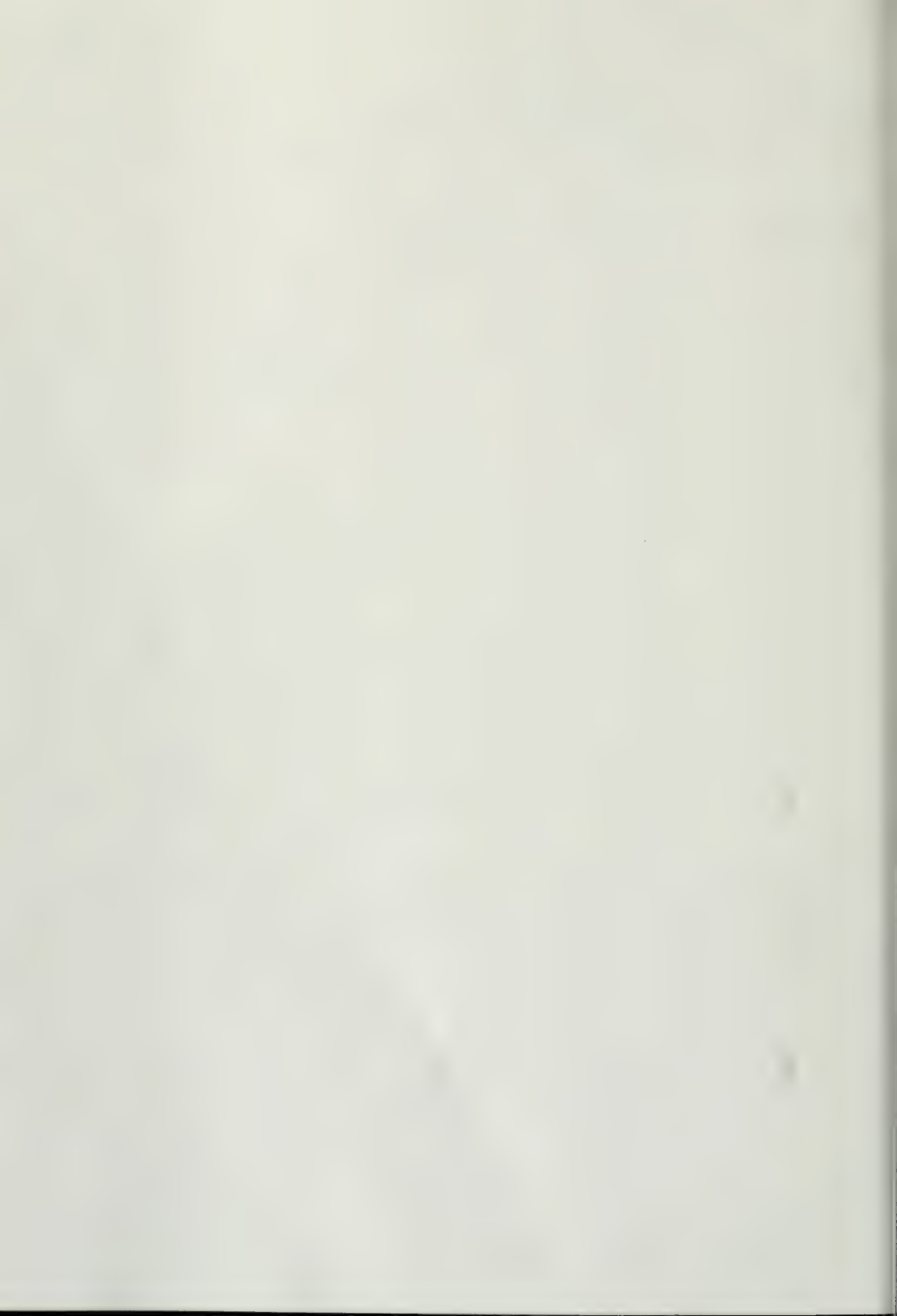


3. For right of counsel purposes, there is no distinction between a probation revocation and a parole revocation hearing 5
4. The California indeterminate sentence law is unconstitutional as violative of due process and equal protection clauses of the Fourteenth Amendment 6
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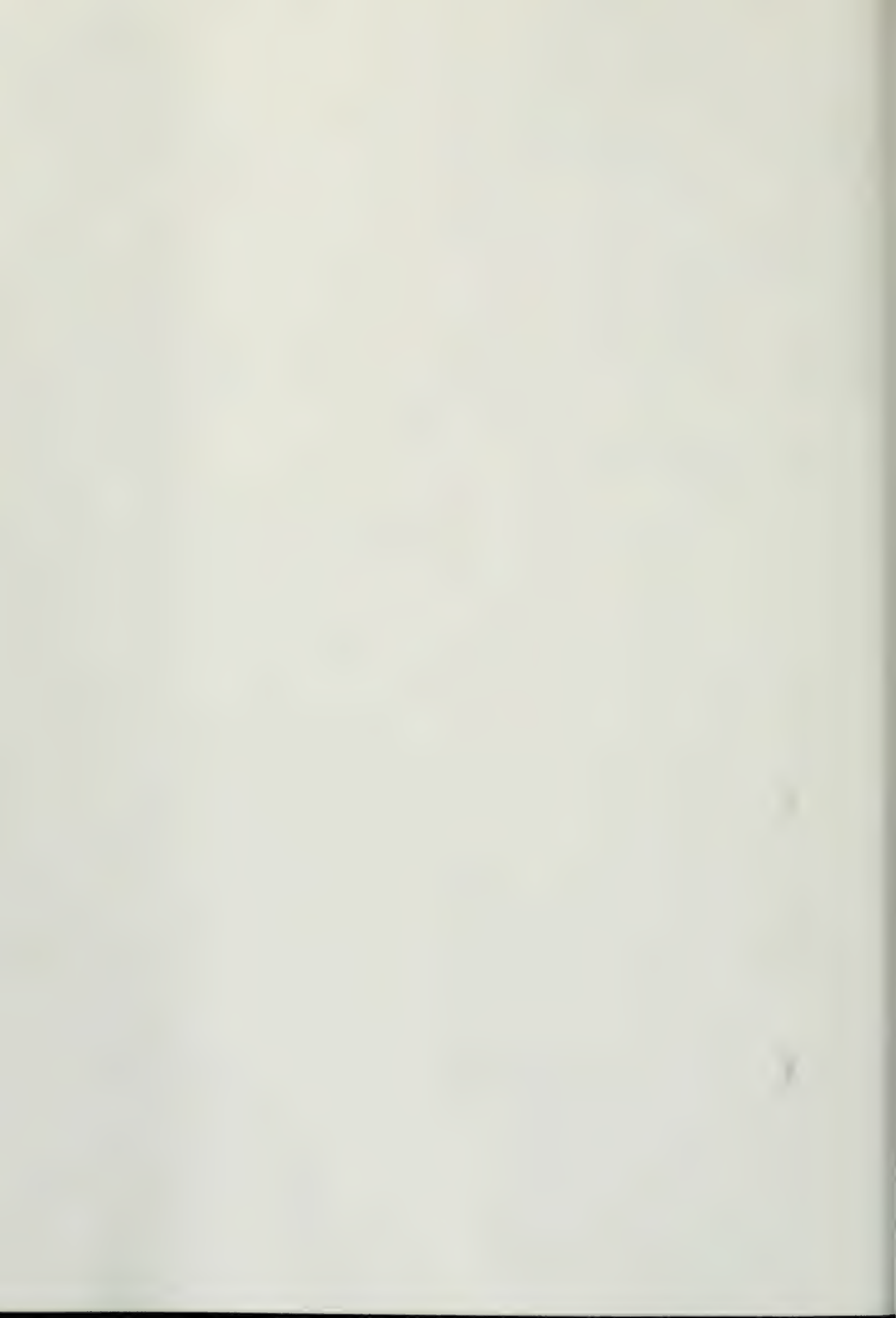
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FOR THE NINTH CIRCUIT

CAROL J. WINTHAL,
MARTIN J. WINTHAL,

Appellants,

versus

MANLEY BOWLER,

Appellee.

No. 22, 808

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MARTIN J. WINTHAL,

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versus

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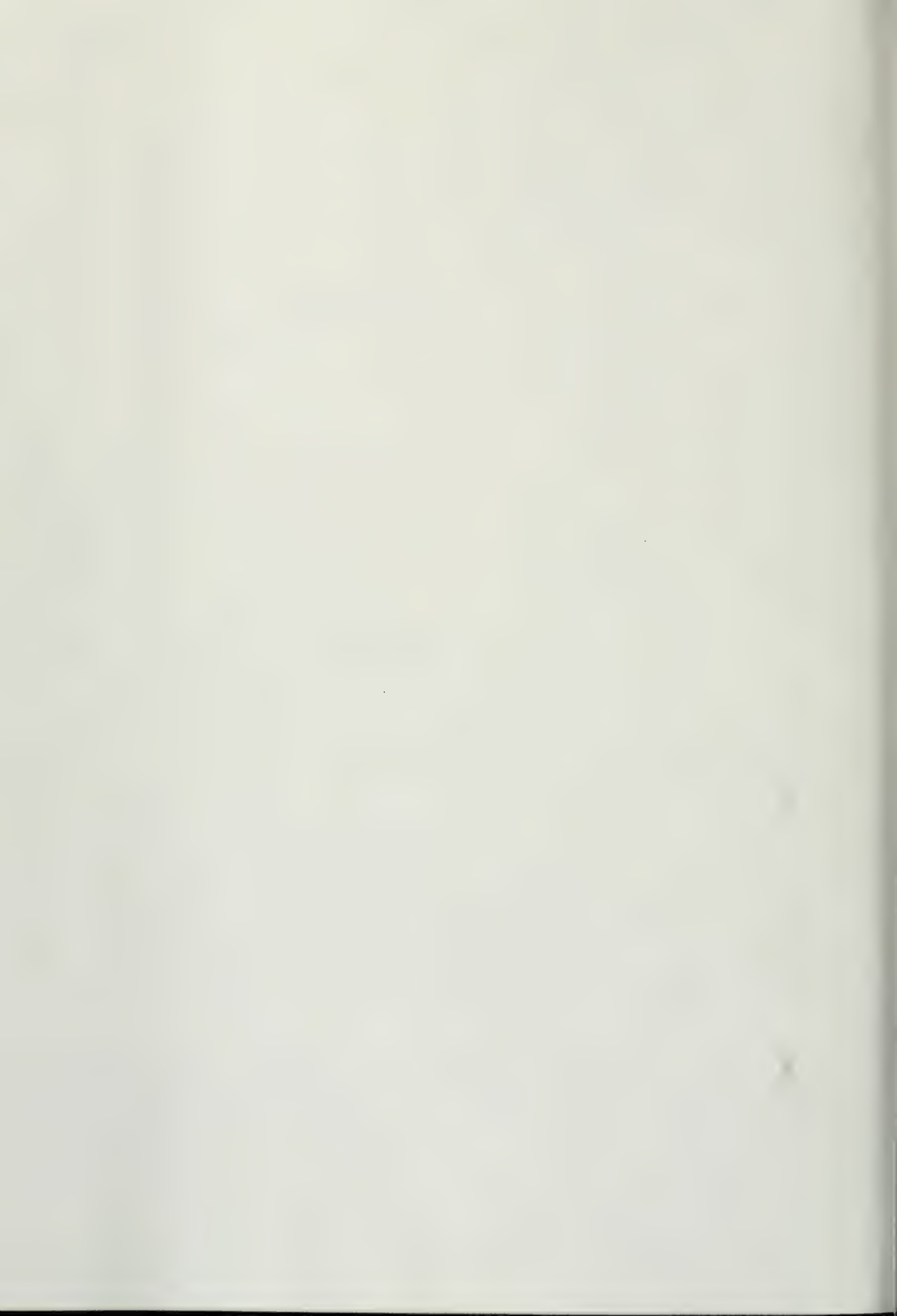
Appellees.

APPELLANTS' OPENING BRIEF

STATEMENT OF PLEADINGS AND FACTS
DISCLOSING JURISDICTION

The complaint sets forth three claims and injunctive relief is sought in this civil rights action based on 42 USC 1983, 28 USC 1331, and 1343. The city and county defendants await trial under the first claim and no issue is presented as to those defendants.

The District Court dismissed the second claim as to the federal



injunction should not issue as to the state defendants. This Court has jurisdiction of the appeals under 28 USC 1291-2.

STATEMENT OF THE CASE

Facts

Preliminary Statement

The dismissal as to Bowler is inextricably bound together with liability of Smythe, and Kamp, other state employees, because the District Court has declined to rule on the latter two motions to dismiss pending determination as to Bowler only. Because of this fact and because the unconstitutional state statute [Cal. Penal 3064] bears strongly upon the propriety of the issuance of a permanent injunction, appellants will discuss the facts under the specifications of error in two categories: First, as to Bowler and his state agents, and finally, as to the activities of the federal defendants.

Questions Involved

1. Constitutionality of the California "fictional fugitive statute" [3064 Penal Code] which presumes fugitivity and criminality from an ex parte suspension or revocation of parole, as lacking a rational connection between the fact presumed and the fact proved. This question is raised in connection with the propriety of a permanent injunction to enjoin Bowler (cf. Zwickler v Koota, as District Attorney, County of Kings, 389 US 241, 249, 88 S Ct 391).

2. Is Bowler required or mandated to hold a "parole revocation court" at which the alleged violator is accorded the right to appear personally with counsel, because Bowler's actions involve a deprivation of liberty just as much as did the original criminal action? This question arises as concomitant with injunctive relief based on "unauthorized action under color of state law" by appellee Bowler. (Cf. Combs v La-Valee, 36 LW 2468).

3. Whether California's indeterminate sentence law [1168 Penal Code] delegating to the executive branch parole authority absolute discretion, uncontrolled by standards or directions of any kind, to impose a life sentence, violates the Due Process Clause of the Fourteenth Amendment? This question springs from the propriety of injunctive relief based on "unauthorized action under color of state law" by appellee Bowler. (Review has been granted in a related case: Conway v Adult Authority, No. 974 [211 Misc.] O.T. 1968.)

4. Whether failure of the District Court to render findings or conclusions of law, although requested to do so, permits its judgment of dismissal as to the federal defendants to be labeled "interlocutory" or whether activities of federal defendants here is distinguishable from Bell v Hood, 327 US 678? This question springs from the dismissal based on Rule 12b, shown in the record at pp. 105-6.

5. Is the California doctrine that a prisoner has no right of privacy constitutionally viable? Denial of injunctive relief with respect

on the California Attorney General's position [Tr. 90], "a prisoner has no right of privacy" citing People v Lopez, 60 Cal2d 233, 248, and People v Morgan, 197 CA2d 90, 93.

SPECIFICATIONS OF ERROR

1. The Court erred in dismissing the permanent injunction proceedings, and discharging the order to show cause, without findings and conclusions of law.

2. The Court erred in dismissing the action as to Bowler under Rule 12 (b), and erred in staying proceedings as to Smythe and Kamp, other state agents, pending disposition of the appeal as to Bowler.

3. The dismissal as to the federal defendants [Tr 105-106] without findings of fact and conclusions of law, was erroneous.

ARGUMENT

1. In suits to enjoin official conduct, the provisions of 42 USC 1983 are fully applicable. Zwickler v Koota, 389 US 241, 249-251, 88 S Ct 391. The complaint alleged sufficient irreparable injury to justify equitable relief, and abstention was improper. The court below should have decided the constitutionality of the statutes [3064 and 1108, Calif. Penal Code]. Landry v Daley, 288 Fed.Supp. 200.

2. The statutory presumption set forth in section 3064, Calif. Penal Code, of fugitivity and criminality inferred from an ex parte suspension or revocation of the parole of any prisoner is unconstitutional.

for lack of a rational connection between the fact presumed and the fact proved. In Tot v United States, 319 US 463, 63 SCt 1241, the Court, relying on a line of cases dating from 1910, reaffirmed the limits which the Fifth and Fourteenth Amendments place "upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated." Where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts. Judged by this standard, the statutory presumption in statute 3064 is constitutionally infirm. Cf. U.S. v Romano, 382 US 136, 86 SCt 279.

3. Since Mempa, 389 US 128, requires a lawyer at every stage, appellee Bowler is required, if not mandated, to hold a "parole court" where the alleged violator is given the right to appear personally with counsel, because Bowler's actions involve a deprivation of liberty just as much as did the original criminal action.

Here the relevant facts which triggered the revocation were so capriciously and arbitrarily determined that, in effect, the inmate is deprived of equal protection of the laws. Caprice is further suggested by the retroactive suspension without notice. Cf. Campbell v Pate, 399 US 123, 68. Also, the Supreme Court of Pennsylvania finds "completely untenable" the distinction, for right to counsel purposes, between a probation revocation and a parole revocation hearing. Combs v Tinson, 415 Pa. 115, 1969, 4 CrL 1070.

4. The California indeterminate sentence law which prohibits the court in imposing sentence from fixing the "term or duration of the period of imprisonment" [Penal Code 1168] is unconstitutional.

The statute delegates to the executive branch parole authority absolute discretion, uncontrolled by standards or directions of any kind, to impose a life sentence, and violates the due process clause of the Fourteenth Amendment. Cf. Conway v Adult Authority, No. 974 [211 Misc.] October Term, 1968.

Cast in terms of denial of equal protection, the statute permits the facts on which appellee Bowler acted to be unreliably determined, hence parole is never considered afterward, merely the date changed annually. Cf. Campbell v Pate, CA-7, 9/13/68.

5. The denial of injunctive relief against Bowler was based in part on the California Attorney General's position [Tr. 90], that "a prisoner has no right of privacy" citing People v Lopez, 60 Cal2d 233, 248, and People v Morgan, 197 CA2d 90, 93. However, these pre-Katz [389 US 347] cases are not controlling. The crucial fact now, is that the respective speakers did not consent to the overhearing of their statements and that the conversations were overheard by third persons uninvited by the speaker. To claim, as the California Attorney General does, that one party can waive the Fourth Amendment rights of another is the same thing as saying that Katz would have been decided differently if the recipient of the intercepted phone call had consented to the Government's bugging. It is unbelievable that such a man

form of consent would have rendered the defendant's overheard statements any more admissible in *Katz*. Cf. U.S. v Baker, 401 Fed2d 958, 978; U.S. v Clifford Jones, 9/30/68, 4 CrL 3007; U.S. v. White, CA-7, 4 CrL 2317.

6. The dismissal as to the federal defendants [Tr 105-106] without findings of fact and conclusions of law, was erroneous.

The court below grounded the dismissal on Rule 12 (b) as shown in the record at p. 106, line 6. However, "to act under color" of law does not require that the defendant be an officer of the state. It is enough that he is a willful participant in joint activity with the state or its agents. Any other conclusion would establish an artificial distinction between the "under color" concept in 18 USC 242 and its civil counterpart, 42 USC 1983. Appellants contend that the meaning is the same in both statutes.

How far can a person, not a state agent, insinuate himself with state agents whose conduct is said to violate the Fourteenth Amendment, and not be recognized as a joint participant in the challenged activity?

Appellants contend the federal defendants' activity cannot be considered "purely private" on authority of Evans v Newton, 382 US 296; Smith v Allwright, 321 US 649; Terry v Adams, 345 US 461; Williams II, 341 US at 99-100; and note, concurring opin., of Harlan in Peterson v City of Greenville, 373 US 244, or Burton v Wilmington Parking Authority, 365 US 715, all involving "joint participants."

Appellants' keystone is Bell v Hood, 327 US 678, and Dow v Baird, 389 Fed2d 882.

The motion to dismiss provided by Rule 12 (b) (6), wielded by the federal defendants, is not a surreptitious reincarnation of the former general demurrer which was abolished by Rule 7(c). That abolition meant what it said. Dennis v Village of Tonka Bay, 151 Fed2d 411; Musteen v Johnson, 133 Fed2d 106.

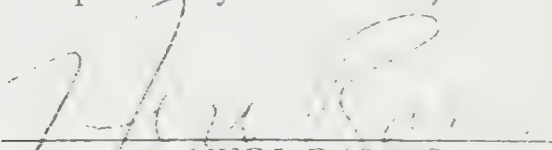
See also Land v Dollar, 330 US 731, 735, cited with approval in Brown v Brown, 368 Fed2d 992; Cohen v Norris, 300 Fed2d 24; and Lucero v Donovan, 354 Fed2d 16.

A fair appraisal of the judgment of dismissal below, grounded upon the absence of a debatable constitutional issue, and no other construction is possible of the court's judgment, according to attorneys for the federal defendants, in light of the fact that the entire record is now before this Court, it should, on its own motion, certify the Bell v Hood [327 US 678] question, pursuant to the Revised Rules of the Supreme Court of the United States (Part VI, Jurisdiction of Certified Questions, Rule 28, subd. (1) and (2), and this brief should be treated as a request or application therefor, or, in the alternative, this Court has the power to certify such question "on its own motion" (subd. 2, Rule 28, supra), and to send the entire record to the Supreme Court so certified. In any event, failure of the District Court to state any theory of decision in entering the dismissal, is no basis for overruling Brown, Cohen, Lucero, and other cases in this circuit. Cf. Land v Dollar, 330 US 731, 735.

CONCLUSION

For all of the foregoing reasons, the judgments should be reversed.

Respectfully submitted,


NERI RAMOS
Attorney for Appellants

Certificate of Service by Mail

State of California,)
) ss.
County of San Francisco.)

I, the undersigned, depose and say:

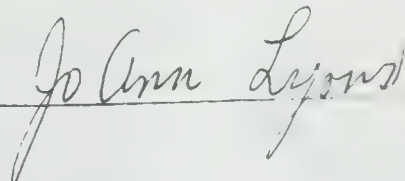
I am a citizen of the United States, over eighteen years of age, and not a party to the within appeal; that on March 1, 1969, I served a copy of the within Appellants' Opening Brief on the Appellees, by placing a true copy thereof in an envelope with adequate first class postage thereon, addressed to appellees' counsel addressed as follows:


Jerry K. Cimmett
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San Francisco 94102

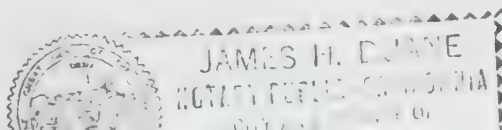
Karl S. Mayer
Deputy Atty. Gen'l.
6000 State Bldg.
San Francisco 94102

and I placed the said envelopes in a postoffice box located at 7th Street and Mission Street, San Francisco, California.

Subscribed and sworn to before me,
this 1st day of March, 1969.



 **JAMES H. DUANE**
Notary Public in and for said County
and State.

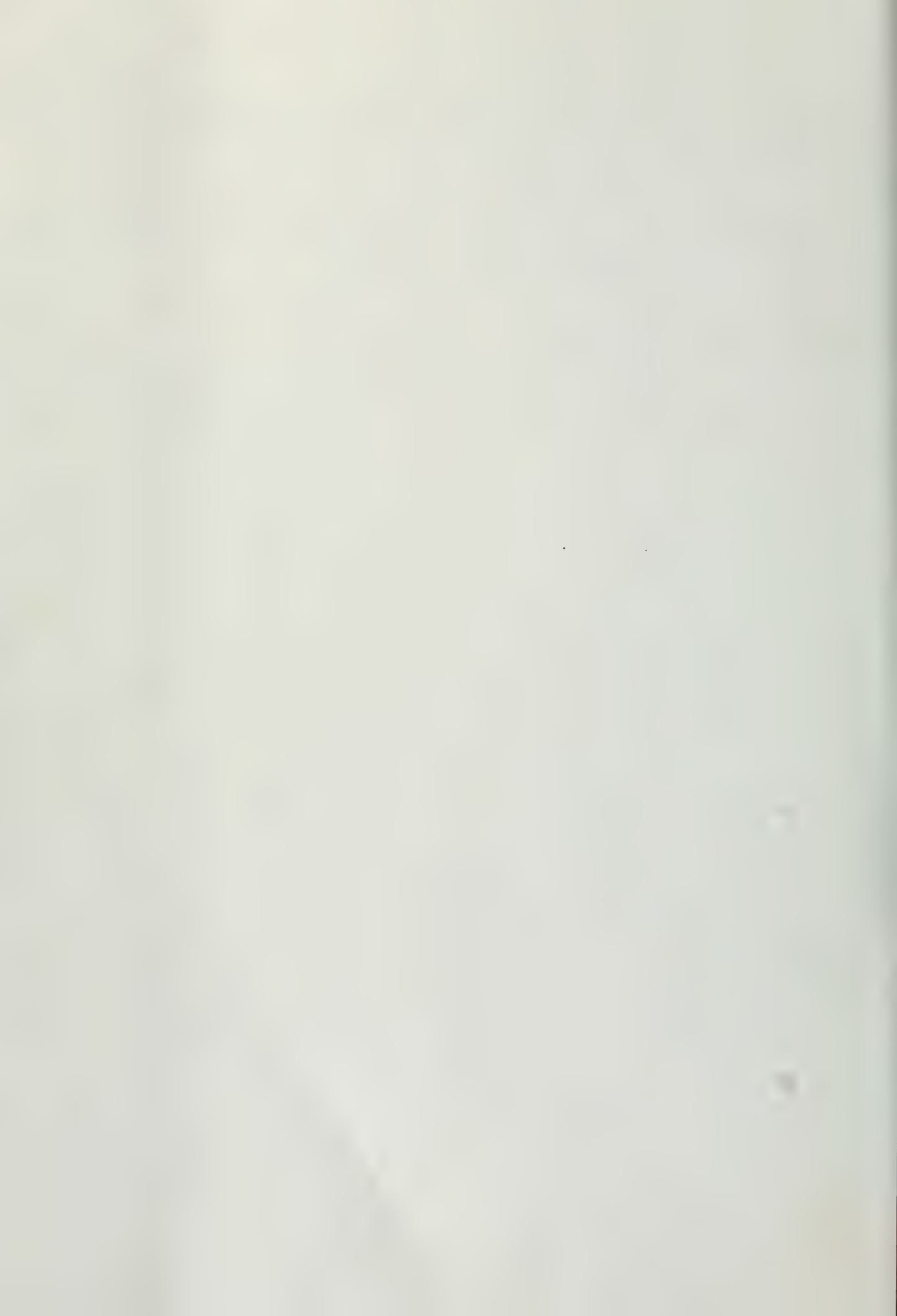


CERTIFICATE

I certify that in connection with the preparation of this brief I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

A handwritten signature in dark ink, appearing to read "Neri Ramos", is written over a horizontal line.

NERI RAMOS
Attorney for Appellants



No. 22,809 ✓

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WYATT ST. B. EUSTIS, JR.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

**Appeal from the United States District Court
for the Northern District of California**

APPELLANT'S OPENING BRIEF

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No. 22,809

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WYATT ST. B. EUSTIS, JR.,	}
<i>Appellant,</i>	
VS.	
UNITED STATES OF AMERICA,	
<i>Appellee.</i>	}

**Appeal from the United States District Court
for the Northern District of California**

APPELLANT'S OPENING BRIEF

JURISDICTION

By information filed October 11, 1967, Appellant was charged with three counts of misdemeanor violation of Title 26 U.S. Code Section 7203, failure to file tax returns for the years 1962, 1963 and 1964. A jury trial was waived and trial commenced before the Honorable William T. Sweigert on February 8, 1968. Appellant was convicted on all three counts and sentence was pronounced on March 5, 1968. Appellant filed a timely notice of appeal on March 12, 1968.

The District Court assumed jurisdiction under the provisions of Title 18 U.S. Code Section 3231. This

Court has jurisdiction to review this judgment under Title 28 U.S. Code Section 1291.

STATEMENT OF FACTS

By information filed October 11, 1967, appellant was charged with three counts of the misdemeanor violation of Title 26 U.S. Code § 7203—failure to file tax returns for the years 1962, 1963, and 1964. (Tr. of R. 1.) It was stipulated that appellant received gross income in excess of \$600.00 during the years charged, that appellant maintained accurate business records concerning income and expenses during the years charged, that appellant was first contacted by agents of the Internal Revenue Service on January 31, 1966, that on March 8, 1966, the appellant filed a delinquent federal income tax return in his own name and that of his wife for each of the calendar years 1957 through 1964 inclusive, and did so by presenting those returns to a special agent of the Internal Revenue Service; and that during the calendar years 1957 and 1958 appellant applied for and was granted extensions of time to file 1957 and 1958 returns, but that for the years 1959 through 1964 appellant made no request for extensions and no such extensions of time were granted. (Tr. of R. 5.)

Trial was commenced Thursday, February 8, 1968, a jury having been waived. (R.T. 2) From the outset it was clear that the sole issue presented to the District Court was whether there was wilful failure to file the required returns for the years in question. (R.T. 5.)

Appellant was and is a public accountant with offices at 934 Terminal Way, San Carlos, California. (R.T. 33:6.) Appellant's failure to file income tax returns for the years 1957 through 1964 was due to the pressure of business; appellant considered his clients' tax affairs as having the greater priority. (R.T. 33:13-22.) After having been granted extensions for the years 1957 and 1958 the pressure of appellant's business increased. There were no other accountants or associates in appellant's office, only some girls doing strictly bookkeeping work. They did not prepare returns. Appellant found that in order to prepare returns for years subsequent to 1957, it was necessary to go back and put the initial return together because it was impossible to file a later return before the earlier because of such factors as depreciation and amortization. (R.T. 34:3-35:3.) Throughout the period within which appellant was charged with failing to file income tax returns, appellant maintained records because he knew the returns were to be filed, had to be filed, and intended to file them. (R.T. 35:13-23.) Appellant never intended to avoid filing returns. (R.T. 36:2.) Moreover, during the year 1960, and possibly 1962 and 1963 appellant became a remainderman in two trusts which were distributed in the 1960's. This caused a change in the type of income appellant received during 1960, 1962, and 1963 and there were tax problems involved with the trusts themselves. This affected appellant's ability to prepare an income tax return because the figures originally submitted to appellant were in error and correspondence with the trustees was necessary. (R.T.

36.) There were two trusts, each distributed in a separate year (R.T. 37:11). Appellant kept accurate records of all transactions concerning these trusts (R.T. 37:24).

Appellant's attempts to make arrangements to find time to prepare these tax returns were frustrated by interruptions from clients or by internal office problems including audits from various governmental agencies. (R.T. 38:2-16.)

Appellant conferred with special agent Brennan of the Internal Revenue Service on February 2, 1966, and on March 8, 1966, appellant presented all of the returns for the years in question. These returns were prepared by the appellant personally who took time out from his office work to do this, devoting from eight to ten hours of each working day including Saturdays and Sundays—about twenty-one days. This included preparation of returns from 1957 through 1964. (R.T. 39:1-40:8.)

Appellant intended to file his federal income tax returns as soon as the figures were put together so that the returns could be filed, and this was as soon as possible. (R.T. 41:4-10.) Appellant filed State of California tax returns at the same time he filed federal returns. (R.T. 42:8-13.) In order to prepare these returns it was necessary for appellant to forego work on clients' returns. (R.T. 43:9.) Appellant was unaware that it was a criminal offense to wilfully fail to file income tax returns on time without proper extension. (R.T. 49:18-22.)

At the time appellant gave the completed income tax returns to Mr. Brennan, he also gave checks covering the taxes, including penalties and interest due to March 8, 1966. (R.T. 16:13.) The penalty through March 8, 1966, was twenty-five per cent and the interest was six per cent. (R.T. 17:15.) Thus, since approximately March 8, 1966, the government has had all of its money. (R.T. 19:15.) On receipt of these tax returns, the Internal Revenue Agents reviewed them and found no errors based on computations. (R.T. 19:21-20:3.) Appellant's records were also examined thoroughly and there was no evidence of a double set of books, of false entries, of alterations in the records, nor of false invoices or false documents. (R.T. 21:11-25.) There was no destruction of records (R.T. 22:2) and nothing from the records or the Revenue Agents' investigation of any conduct on the part of the appellant leading the agents to believe that there was any intent to mislead or conceal (R.T. 22:4-12.) The records were excellent. (R.T. 23:8.)

The investigating agents were satisfied that appellant had made proper reports, during the years in question, concerning income tax and withholding tax for employees and employees' contributions (R.T. 25:10), and that the appellant had an employers' account number (R.T. 25:15). All of these papers were in order and timely filed. (R.T. 25:18.) The internal revenue agents could reasonably conclude that insofar as the operation of appellant's business was concerned, and the handling of funds collected from employees to be paid to the United States Government and the

State of California, all of those returns were in proper order and filed timely and properly computed. (R.T. 26:16.)

The internal revenue agents were unable to find any bad motive or evidence of an evil intent on the part of the appellant, "other than the failure to file returns." (R.T. 29:1-18.)

ISSUES PRESENTED

1. Is the Mere Failure to File an Income Tax Return in the Absence of a Government Showing of Mens Rea, Bad Purpose, Intent to Avoid a Tax or Other Wrongful Purpose, Sufficient to Prove Wilful Failure to File within the Meaning of Title 26, U.S. Code § 7203?

2. Does Defendant's Right to Effective Aid of Counsel Require that Trial Counsel Be Permitted to Read the Presentence Report?

ARGUMENT

A. DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED.

At the close of the Prosecution's case and with only the stipulation and the testimony of special agent Brennan as evidence, counsel for the defendant moved the Court for a judgment of acquittal. (R.T. 30.) The motion was submitted (R.T. 32:15), but not ruled upon. At this point the agent had testified that Mr.

Eustis told him he had not filed any tax returns for the years in question (R.T. 11:19), that he had had sufficient income during the years in question (R.T. 11:25), described the sources of his income (R.T. 12:8) and gave as his reason for not filing the explanation that he was too busy preparing his clients' tax returns and maintaining their accounting records (R.T. 12:15).

Mr. Eustis also told the agent that although he had requested extensions to file for the years 1957 and 1958, he did not request further extensions because he would rather pay the penalties to avoid the trouble for himself and his clients. (R.T. 14:8.) All of Mr. Eustis' records were precise and accurate (R.T. 19:28) and the agent was unable to perceive any bad motive other than not filing (R.T. 29:1). This was the state of the record at the time the Government rested and trial counsel moved the Court for judgment of acquittal. (R.T. 30.)

“The evidence at the close of the Government's case must be sufficient to *sustain* a conviction, that is, it must be such evidence that reasonable persons *could* find guilt beyond a reasonable doubt. It is not a requirement that the evidence *compel*, but only that it is capable of or sufficient to persuade the jury to reach a verdict of guilt by the requisite standard.”

Crawford v. United States (DC Cir. 1967), 375 F.2d 332, 334.

“Ordinarily one is not guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal. That awareness is all

that is meant by the mens rea, the 'criminal intent' necessary to guilt. . . ."

United States v. Byrd (2nd Cir. 1965), 352 F.2d 570, 572.

It is respectfully submitted that the evidence was insufficient to sustain the conviction and the motion of appellant's trial counsel should have been granted.

B. THE CIRCUITS ARE IN CONFLICT ON THE MEANING OF WILFULNESS AS APPLIED TO § 7203.

1. The Ninth Circuit.

In filing notice of appeal in the present case, counsel were not unaware of this Court's decision in *Abdul v. United States* (9th Cir. 1958), 254 F.2d 292. There, this Court determined that the meaning and degree of proof of "wilful" differed depending on whether the crime charged was a felony or a misdemeanor.

"The meaning of the word 'wilfully' as used in the tax statutes has been considered in a number of cases and seems to have come to rest in this circuit, as well as others, as meaning with respect to felonies, 'with a bad purpose or evil motive.' (citing cases) But the meaning of the word 'wilfully' as used in the statute defining a misdemeanor has not as yet reached such repose."

Abdul v. United States (9th Cir. 1958), 254 F.2d 292, 293.

In *Abdul* this Court approved the following instruction:

“ . . . the word ‘wilful’ as used in (the misdemeanor) counts . . . , that is, failing to make a tax return, means with a bad purpose or without grounds for believing that one’s act is lawful or without reasonable cause, or capriciously or with a careless disregard whether one has the right so to act.”

Abdul v. United States (9th Cir. 1958), 254 F.2d 292, 294.

This Court explained:

“The definition of the word ‘wilfully’ as used in the misdemeanor statute was correctly defined in the instructions given by the court. That a difference exists in the meaning of ‘wilfully’ when used in the statute defining a felony and that defining a misdemeanor is recognized. It is ‘a word of many meanings, its constructions often being influenced by its context.’ (*United States v. Murdock*, 290 U.S. 389, 54 Sup. Ct. 223, 78 L.ed. 381.) ‘It may well mean something more as applied to non-payment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of wilfulness.’ (*Spies v. United States*, 1943, 317 U.S. 492, 497-498, 63 Sup. Ct. 364, 367, 87 L.ed. 418.) In the definition given, the trial court began with the statement that ‘wilful’ as used in the misdemeanor counts means with a bad purpose, which standing alone would meet appellant’s criticism, but it is argued that the addition of the words ‘or without grounds for believing that one’s act is lawful or without reasonable cause, or capriciously, or with a careless disregard whether one has the right so to act,’ so watered down the

meaning of the term 'with a bad purpose' as to render the instruction erroneous. We conclude that the word 'wilful' as used in the misdemeanor statute means something less when applied to a failure to make a return than as applied to a felony nonpayment of a tax. This being true, then the words used in the instruction defining 'wilful' as relates to a misdemeanor adequately and clearly point up that difference."

Abdul v. United States (9th Cir. 1958), 254 F. 2d 292, 294.

"We hold that the instruction defining 'wilful' as used in the misdemeanor counts of the indictment in the instant case was not erroneous."

Abdul v. United States (9th Cir. 1958), 254 F. 2d 292, 295.

This Court reaffirmed its view as stated in *Abdul, supra*, in *Martin v. United States* (9th Cir. 1963), 317 F.2d 753. It seems, then, that in the 9th Circuit with respect to the violation of § 7203, "wilful" means one of the following:

1. With a bad purpose, or
2. Without grounds for believing that one's act is lawful, or
3. Without reasonable cause, or
4. Capriciously, or
5. With a careless disregard whether one has the right so to act.

It should be remembered that appellant was unaware that it was a criminal offense to fail to file on

time without proper extension, wilfully. (R.T. 49:18.) The Government offered *no proof whatever* of any of the foregoing “misdemeanor” definitions of wilful. The *only* evidence in support of “wilfulness” was the failure to file itself.

2. The Third Circuit.

In *United States v. Vitiello* (3rd Cir. 1966), 363 F.2d 240, the court was concerned with the definition of “wilfully”, in its application to § 7203. The trial court had charged the jury as follows:

“And the word is employed to characterize such conduct as marked by a *careless disregard whether or not one has a right to so do.*

“And by the term wilfully, as used in the statute, means with a bad purpose or *without grounds for believing that one’s act is lawful or with such a careless disregard whether one has a right so to act.*

“The word wilful means with a bad purpose or *without grounds for believing that one’s act is lawful or without reasonable cause or capriciously or with a careless disregard whether one has a right so to act.*”

United States v. Vitiello (3rd Cir. 1966), 363 F.2d 240. (Emphasis added by the Court.)

The 3rd Circuit, in reviewing the cases interpreting the word “wilful” as it relates to Title 26 § 7201 and § 7203, stated:

“Our examination of the issue thus raised begins with the much cited opinion in *United States v. Murdock* (1933), 290 U.S. 389, 54 Sup. Ct. 223, 78

L.ed. 381, relied on by the dissent in the instant case and presumably the basis of the lower court's instruction. In *Murdock*, the defendant was convicted for failing to give required tax information in violation of an earlier statute from which section 7203 was derived. The lower court had instructed the jury to the effect that one who voluntarily refused to give the required information would be guilty of 'wilfully' failing to give the information. Thus, the issue before the Supreme Court was the proper definition of 'wilfully' as the *mens rea* requirement of this misdemeanor. In framing the issue, the court noted that wilful is a word of many meanings, for example, merely voluntary as contrasted with accidental, but that in a criminal statute it generally means 'an act done with a bad purpose * * *; without justifiable excuse * * *.' 290 U.S. at 394, 54 Sup. Ct. at 224. Then, the court continued to catalog various other meanings of wilfully, including the following:

'The word is also employed to characterize a thing done without ground for believing it is lawful * * * or conduct marked by careless disregard whether or not one has the right so to act * * *.' 290 U.S. at 394-395, 54 Sup. Ct. at 225.

"However, this enumeration of different meanings of wilfully in various contexts should not be read as a statement that several definitions, among them the one last quoted above, are comprehended by the criminal statute in question. Indeed, rather than adopting a number of meanings, the Court proceeded to consider the context of the misdemeanor section and concluded that wilful as an element of the offense connoted 'bad faith

or evil intent'. 290 U.S. at 398, 54 Sup. Ct. at 226."

United States v. Vitiello (3rd Cir. 1966), 363 F.2d 240, 242 (1966).

"Instructions which define an act as wilful when done 'without ground for believing it is lawful', or when 'marked by careless disregard whether or not one has the right so to act', have been rejected by this court as improper dilutions of the scienter required by section 7203. *United States v. Palermo* (3rd Cir. 1958), 259 F.2d 872; accord *Haner v. United States* (5th Cir. 1963), 315 F.2d 792; cf. *United States v. Litman* (3rd Cir. 1957), 246 F.2d 206.

"Our affirmative statements of the meaning of 'wilfulness' in section 7203 or its predecessor clearly exclude any type of carelessness or negligence, however inexcusable. Thus, in the *Palermo* case we said:

"Wilfulness is an essential element of the crime prescribed by [the misdemeanor section] * * *. It requires existence of a specific wrongful intent—an evil motive—at the time the crime charged was committed * * *. Mere laxity, careless disregard of the duty imposed by law, or even gross negligence, unattended by 'evil motive' are not probative of 'wilfulness'". 259 F.2d at 882.

"Similar language appears in *United States v. Litman*, *supra* at 209. The 'wilful' requirement means an act both 'intentional and reprehensible', *United States v. Goldman* (3rd Cir. 1965), 352 F.2d 263, 265 n. 3, 'attended by knowledge of the legal obligation and purpose to prevent the gov-

ernment from getting that which it lawfully requires', *United States v. Cirillo* (3rd Cir. 1957), 251 F.2d 638, 639."

United States v. Vitiello (3rd Cir. 1966) 363 F.2d 240, 242.

"Two cases in the Ninth Circuit, *Abdul v. United States*, 1958, 254 F.2d 292, and *Martin v. United States*, 1963, 347 F.2d 753, and the dissent in the instant case seek to justify a less restrictive definition of 'wilfulness' by arguing that the standard of wilfulness is different for the misdemeanor, defined by section 7203, than for the felony—attempt to evade tax—defined by section 7201. Justification for this claimed distinction is thought to be found in the language of the *Spies* case in which the Court distinguished the misdemeanor from the felony, saying:

'The difference between the two offenses, it seems to us, is found in the affirmative action implied from the term "attempt", as used in the felony subsection.' 317 U.S. at 498, 63 Sup. Ct. at 368.

'* * * [For the felony] Congress intended some wilful commission in addition to the wilful omissions that make up the list of misdemeanors.' 317 U.S. at 499, 63 Sup. Ct. at 368.

"It is true that, by this language, *Spies* makes a distinction between the criminality of the misdemeanor and the criminality of the felony. *United States v. Long* (3rd Cir. 1958), 257 F.2d 340. However, this distinction is found in the additional misconduct which is essential to the violation of the felony statute, examples of which are given in *Spies* at page 499 of 317 U.S., at page

368 of 63 Sup. Ct., and not in the quality of wilfulness which characterizes the wrongdoing. Thus, in *Sansone v. United States*, 1965, 380 U.S. 343, 85 S. Ct. 1004, 13 L.ed. 2d 882, the defendant, indicted and tried for the section 7201 felony, claimed that he was entitled to a charge on the misdemeanor under the lesser included offense doctrine. After finding that the only issue at trial was whether the defendant's acts charged as constituting attempted tax evasion were 'wilful', the Court held that the defendant was not entitled to a lesser offense charge because, as applied to the given fact situation, 'Wilful' in the two sections '“covered” precisely the same ground'. 380 U.S. at 352, 85 Sup. Ct. at 1010.

“Actually, one of the conclusions of the Court in *Spies* was that to be convicted of failure to pay a tax, the misdemeanor, the failure must be characterized by 'some element of evil motive' because to convict in absence of such scienter would violate 'our traditional aversion to imprisonment for debt'. 317 U.S. at 498, 63 Sup. Ct. at 367.

“It follows that it was error in this case to instruct the jury that it might find 'wilfulness' within the meaning of section 7203 in conduct characterized by merely careless disregard of legal obligation or in acts that were merely capricious or not justified by any reasonable belief in their legality.”

United States v. Vitiello (3rd Cir. 1966), 363 F. 2d 240, 243.

C. The Reasoning of the Third Circuit Should Be Applied to the Facts of This Case.

In order to apply the reasoning of the Third Circuit to the facts of this case, it is not necessary for this Court to wholly reject *Abdul* and similar cases. *Abdul* involved a jury trial where the instructions found proper included the phrase “Wilful . . . means with a *bad purpose*. . . .” No case has been found in the Ninth Circuit where this Court has held that a *mere failure to file a return*, without more has been held to be a sufficient showing of wilfulness to justify a conviction.

It appears that in arriving at its conclusions, the Court in *Abdul* stressed the dictum of *United States v. Murdock*, 290 U.S. 389, 54 Sup. Ct. 223, 78 L.ed. 381, and *Spies v. United States*, 317 U.S. 492, 497-498, 63 Sup. Ct. 364, 367, 87 L.ed. 418, to the effect that the word “wilful” is a word of many meanings, and may well mean something more as applied to *nonpayment* of the tax than where applied to failure to *make a return*. A careful analysis of *Murdock* and *Spies* appears not to compel the conclusion that proof of the misdemeanor crime of failure to file a tax return may be proved by evidence less than that amounting to a *mens rea*.

In *Murdock* the defendant was charged with refusal to give testimony and supply information relating to deductions claimed in his tax returns for monies paid to others in violation of § 1114(a) of the Revenue Act of 1926 and § 146(a) of the Revenue Act of 1928, which sections were identical. Inter alia, these sections provide:

“any person . . . who wilfully fails to . . . make such return . . . or supply such information. . .”

A careful examination of *Murdock* discloses that the Court there made no suggestion, by either holding or dictum, that “wilfully” insofar as it relates to failure to make a return, may be proved by anything less than a showing of mens rea, or a bad motive.

In *Murdock*, the defendant was charged with a wilful failure to give information and the thrust of the opinion deals with the defendant’s failure to disclose the identity of the person to whom he claimed he made deductible payments. But because of the failure of the Court to otherwise caution, it would seem that the following language should be equally applicable to that portion of the section dealing with a wilful failure to make a return. The Court in *Murdock* made these comments:

“The Revenue Acts command the citizen, where required by law or regulations, to pay the tax, to make a return, to keep records, and to supply information for computation, assessment, or collection of the tax. He whose conduct is defined as criminal is one who ‘wilfully’ fails to pay the tax, to make a return, to keep the required records, or to supply the needed information. Congress did not intend that a person, by reason of a bonafide misunderstanding as to his liability for the tax, as to his duty to make the return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. And the requirement that the omission of

these instances must be wilful, to be criminal, is persuasive that the same element is essential to the offense of failing to supply information."

United States v. Murdock (1933), 290 U.S. 389, 395, 54 Sup. Ct. 223, 226, 78 L.ed. 381, 385.

"Here we are concerned with a statute which denounces a wilful failure to do various things thought to be requisite to a proper administration of the income tax law, and the government in the trial below, we think correctly, assumed that it carried the burden of showing more than a mere voluntary failure to supply information, with intent in good faith, to exercise a privilege granted the witness by the Constitution. The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense."

United States v. Murdock (1933), 290 U.S. 389, 396, 54 Sup. Ct. 223, 226, 78 L.ed. 381, 386.

Counsel realizes that the foregoing language was used by the Court in *Murdock* primarily with reference to that violation dealing with the defendant's failure to incriminate himself by disclosing the identity of the person to whom he had made the deductible payments; however, by failure to distinguish the section involving a wilful failure to make a return, the Court seems to make the foregoing language applicable to a wilful failure to make a return as well. In any event, *Murdock* discloses no sound basis

for an inference that the Supreme Court intended that a wilful failure to make a return requires *less* than an evil intent or bad faith. Thus, to the extent that this Court's decision in *Abdul* rests on *Murdock, supra*, its foundation is weakened.

In *Spies v. United States* (1943), 317 U.S. 492, 63 Sup. Ct. 364, 87 L.ed. 418, the defendant was charged with making a wilful *attempt* to evade or defeat a tax. Although the Court in *Spies* does use language by way of dictum suggestive of a distinction in the quantum of proof necessary to convict for the felony (attempt to evade or defeat a tax) and the misdemeanor (wilful failure to pay a tax or make a return) a close analysis of *Spies* indicates clearly that that Court was concerned with the methods by which a *wilful attempt to defeat and evade* might be proved. (Citing by way of illustration that a wilful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets, of covering up sources of income, etc.) The Court in *Spies* does not suggest that a wilful failure to file may be proved by a mere failure to file, or in the absence of mens rea or bad purpose. The Court merely points out:

“Wilful but passive neglect of the statutory duty *may* constitute the lesser offense. . . .”

Spies v. United States (1943), 317 U.S. 492, 499, 63 Sup. Ct. 364, 468, 87 L.ed. 418, 423 (emphasis added).

“Mere voluntary and *purposeful*, as distinguished from accidental omission to make a timely return *might* meet the test of wilfulness.”

Spies v. United States (1943), 317 U.S. 492, 498, 63 Sup. Ct. 364, 367, 87 L.ed. 418, 422 (emphasis added).

It is submitted that the distinction between wilfulness as used in the felony section and wilfulness as used in the misdemeanor section lies, as stated *supra*, page 15 herein in *United States v. Vitiello* (3rd Cir. 1966) 363 F.2d 240, in the *additional misconduct* which is essential to the violation of the felony statute, *and not in the quality of wilfulness which characterizes wrongdoing*. For his failure to file and pay the tax when due, appellant herein has paid to the Government all penalties and interests demanded. (R.T. 16:13.) It seems one thing for the Government to exact penalties and interest for a “mere failure to measure up to the prescribed standard of conduct” (*United States v. Murdock, supra*), or for failure “to observe statutory duties to make timely returns” (*Spies v. United States, supra*), and quite another to make the citizen who has maintained precise and accurate records a criminal by reason of a mere failure to file, without any showing whatever of a criminal intent, or mens rea that is normally found in any crime for which a person is to be subjected to punishment. The Revenue Agents here were unable to find any bad motive or evidence of evil intent on the part of the appellant other than the failure to file a return. (R.T. 29:1-18.) Even during the period that

the appellant failed to file, he was nevertheless making proper reports concerning income tax and withholding tax for employees and employees' contributions (R.T. 25:10), and had an employer's account number (R.T. 25:15). These factors alone indicate an absence of a plan to avoid filing at all; and this is the true reason for the criminal punishment. It is unjust to fix criminal sanctions and a criminal record on a responsible citizen whose failure arose simply from a series of circumstances that made it impossible for him to both file the tax when due and continue to handle clients' affairs.

Finally, unless the word "wilfully" was intended by Congress to mean something more than a mere failure to file, there is little reason for its inclusion in § 7203, for the same purpose would be served by its deletion.

D. Refusal to Permit Trial Counsel to Inspect the Probation Report Is a Denial of Effective Aid of Counsel.

In *Verdugo v. United States of America* (9th Cir. decided May 16, 1968) No. 20803; amended opinion filed October 7, 1968, it was determined that consideration by the Court of a probation report containing information that had been excluded at trial and was prejudicial was reversible error. In *Verdugo*, this Court noted that counsel's argument to the effect that the accused's right to "make a statement in his own behalf and to present any information in mitigation of punishment" (Rule 32(a), Fed. R. Crim. P.) was of little value without knowledge of the allegations in the presentence report had force and that the authorities provided no ready answer.

It is appellant's contention here that the rule of *Verdugo* should be applied and that reversal is required to permit appellant's counsel to inspect the presentence report.

In advancing this point, appellant does not suggest that harmful material *was* presented to the trial Court; only that the right of trial counsel to inspect the presentence report in every instance should be made clear, as a requirement of effective aid of counsel.

CONCLUSION

It is not necessary in order to reverse this conviction, for this Court to wholly adopt the reasoning of the Third Circuit, nor to establish a rigid definition of wilfulness as applied to Section 7203. It is enough to perceive that under the facts of this case, where no more was shown by the Government than a *mere failure to file a return*, an adequate showing of wilfulness has not been made.

If a distinction between the felony and misdemeanor section meanings of wilfulness is to be made, that distinction should go to the *additional misconduct* which is essential to the violation of the felony statute, and not to the *quality of wilfulness which characterizes wrongdoing*.

Unless the word wilfulness comports some bad purpose, there is no logical reason for its placement in

Section 7203, and the crime should be complete merely on failure to file.

The judgment should be reversed.

Dated, San Francisco, California,
October 29, 1968.

Respectfully submitted,

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LIN B. DENSMORE,

By LIN B. DENSMORE,

Attorneys for Appellant.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAR 10 1969

WYATT ST. B. MUSTIS, JR.,

Appellant,

v.

NO. 22,809

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE
UNITED STATES OF AMERICA

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R. STEWART LANGFORD
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FILED

MAR 10 1969

U.S. DISTRICT COURT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WYATT ST. B. EUSTIS, JR.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

NO. 22,809

BRIEF OF APPELLEE
UNITED STATES

I.

ISSUES PRESENTED FOR REVIEW

1. Was the evidence sufficient to sustain a finding that appellant's failure to file income tax returns for several successive years was wilful within the meaning of Title 26, United States Code Section 7203?

2. Did appellant and his counsel waive any right to inspect the presentence report?

II

STATEMENT OF THE CASE

The Nature of the Case: A criminal information was filed against appellant on October 11, 1967, for failure to file income tax returns for the years 1962, 1963 and 1964, in violation of 26 U.S.C. §7203. A jury was waived and the appellant proceeded to trial on February 8, 1968 before the Honorable William T. Sweigert. Appellant was represented by retained counsel, Dennis L. Woodman. At the close of the evidence the Court found the appellant guilty on all counts. On March 5, 1968, appellant was sentenced to a term of one year, all of which was suspended except for three months, and was ordered to pay a fine of \$8,000 on each count, same to be concurrent on all counts. Execution of sentence was stayed until May 1, 1968. On March 12, 1968, Notice of Appeal was filed. 1/

1/ Jurisdiction in the District Court was predicated upon 18 U.S.C. §3231. Jurisdiction on appeal is invoked under 18 U.S.C. §1291.

Statement of Facts: The appellant, a public accountant with long experience in tax matters, admitted to agents of the Internal Revenue Service when contacted in February of 1966 that he had not filed income tax returns since 1956. 2/ Appellant also advised the agents that for the years 1959 to 1964 he sought no extensions of time within which to file, although he was aware of the existence of such procedure, since he had filed for and received extensions within which to file his 1957 and 1958 income tax returns. 3/ Appellant testified that he had not filed timely returns due to the press of business. 4/ Appellant further testified that after receiving extensions with respect to his 1957 and 1958 returns, he decided thereafter not to bother with extensions because they were "trouble" and he would rather pay the penalties and interest. 5/

2/ Record, p. 11.
It was stipulated, for purposes of the trial, that Eustis was required by law to file a timely Federal tax return each year and that he knew he was required to do so each year.

3/ Record, pp. 13-14.

4/ Record, p. 33.

5/ Record, p. 14.

The first part of the paper discusses the importance of the study of the history of the United States. It is argued that a knowledge of the past is essential for a full understanding of the present. The author then proceeds to a detailed examination of the various factors which have shaped the development of the United States, including the influence of the European settlers, the role of the Native Americans, and the impact of the American Revolution. The paper concludes by emphasizing the need for a continued study of the past in order to better understand the challenges of the future.

The second part of the paper is a critical analysis of the various theories of the development of the United States. It is argued that the dominant theory, which views the United States as a product of the European settlers, is flawed. The author then presents an alternative theory, which views the United States as a product of the interaction between the European settlers and the Native Americans. This theory is supported by a detailed examination of the historical evidence, including the writings of the early settlers and the accounts of the Native Americans. The paper concludes by arguing that this alternative theory provides a more accurate and complete understanding of the development of the United States.

The third part of the paper is a discussion of the implications of the author's theory for the study of the history of the United States. It is argued that the author's theory challenges the traditional view of the United States as a product of the European settlers, and therefore requires a re-evaluation of the historical evidence. The author then discusses the implications of this re-evaluation for the study of the history of the United States, and concludes by arguing that the author's theory provides a more accurate and complete understanding of the development of the United States.

In February, 1966 Eustis was first contacted by agents of the Internal Revenue Service who were investigating his filing delinquencies. At the next meeting between the agents and the appellant, he presented to them completed Federal income tax returns for the years 1957 to 1964, which he stated had been prepared within the three-week interval since the prior meeting.^{6/} Appellant testified that he had also prepared and filed within that same three-week period all of his State income tax returns for the same delinquent years.^{7/}

III.

ARGUMENT

A.

The single issue before the District Court was whether the appellant's failure to file timely Federal income tax returns for each of the years 1958 through 1964 was wilful.^{8/} Having waived a jury

^{6/} Record, p. 40.

^{7/} Record, p. 42.

^{8/} The second issue before this Court arose subsequent to conviction, and concerns whether the District Court should have provided defense counsel with the pre-sentence report, absent a request for same.

and presented the matter to the District Court for trial, the appellant stipulated that he had been required to file timely income tax returns for each of said years; that he had been aware that he had received sufficient income during said years as to require the timely filing of such returns; but that he had not timely filed such returns. Upon such stipulation, the Government's evidence, and the testimony of the appellant, the Court found that Eustis had deliberately and intentionally failed to timely file the mentioned tax returns, and accordingly, a verdict of guilty was entered as to all counts.

The Court's decision was based upon evidence of facts and circumstances from which the inference could reasonably be drawn that appellant's failure to file such timely returns was wilful.

During the years in which appellant did not in fact make timely filings of his income tax returns, he maintained an active practice as a public accountant, wherein he was particularly concerned with the handling of the business and tax affairs of his particular clients. It was during this period that

he filed neither Federal nor State income tax returns for eight consecutive years.

Appellant claimed that the press of business affairs, particularly those of attending to the personal business and tax affairs of his clients, precluded him from the preparation and filing of his own individual tax returns. Yet, the evidence demonstrated that within three weeks from the time he was initially contacted by agents of the Internal Revenue Service, the appellant prepared both his Federal and State income tax returns for all eight years.

The defendant argued to the District Court that at best or worst his failure to file timely tax returns was negligent, and should be characterized in the fairy tale context of the "barefoot shoemaker's daughter". In light of all the evidence on the issue of wilfulness and intent, the District Court properly rejected this excuse of characterization.

This Court has passed upon the question of intent in comparable prosecutions of failure to file cases. Abdul v. United States (9th Cir. 1958), 254 F.2d 292, and Martin v. United States (9th Cir. 1963), 317 F.2d 753. The standards stated therein are

applicable to the record in the instant matter. ^{9/}

The protracted failure to file income tax returns over a period of eight consecutive years was sufficient to support the Court's finding that the conduct and intent of the appellant was wilful in respect to each count upon which he was found guilty. Litman v. United States, (3rd Cir. 1957), 246 F.2d 206, 208.

Put simply, notwithstanding his background, training and professional practice, the appellant deliberately and openly chose on repeated occasions to delay indefinitely the filing of his own income tax returns, for personal reasons and motives.

B.

Counsel for defendant argues that this matter should now be returned to the District Court to afford him the opportunity of reviewing the pre-sentence report, citing for this proposition Verdugo

^{9/} The cases of other Circuits and District Courts cited and urged upon this Court by appellant may be of academic interest; however, the holdings therein are not subscribed to by appellee, nor considered appropriate or controlling in this Circuit.

v. United States of America, (9th Cir., decided May 16, 1968, No. 20803; amended opinion filed October 17, 1968), (____ F.2d ____).

The circumstances concerning the preparation, contents and employment of the presentence report with which the Court was concerned in Verdugo are peculiar to that case, and bear no similarity to the posture of the presentence report concerned in this case.

Interestingly, in Verdugo this Court commented (footnote 17) that due to the particular circumstances of that case it was "unnecessary to consider whether Verdugo's claim should be rejected, because his counsel failed to request the trial judge to disclose the report after having been refused access to the report by the probation officer."

Unlike the situation in Verdugo, counsel for the defendant in this case discussed the presentence report with the probation officer, and was advised by both the probation officer and the Court at the time of sentence that there was "nothing controversial" or involving "moral turpitude" with which to be concerned. ^{10/} In light of these circumstances,

^{10/} Record, pp. 60, 65.

appellee submits that appellant waived any right to inspect the presentence report.


CONCLUSION


The Government's evidence showed more than a "mere failure to file a return" by appellant. The Government showed that the appellant deliberately made the decision to forego the filing of timely income tax returns for several successive years at the calculated risk of paying penalties and interest. The Government's evidence further showed that despite the availability of records which would have permitted the appellant to have filed such returns, it was only after the appearance of the Government's agents that appellant hastily prepared and filed such returns. In short, the evidence depicts an individual well versed in tax matters, particularly with respect to the preparation and filing of income tax returns, who deliberately took calculated risks in respect to the non-filing of his own tax returns. Surely, such deliberate calculation can only be characterized as wilful.

Accordingly, the judgment should be affirmed.

Respectfully submitted,

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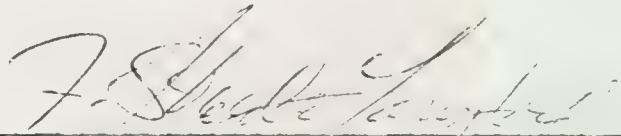

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Dated: January 9, 1969

CERTIFICATE OF SERVICE BY MAIL

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DATED: January 9, 1969.

Wyatt St. B. Eustis, Jr.
v. United States of America
C. A. 9th No. 22,809
Criminal No. 41577,
USDC, ND California.

No. 22,810

IN THE

FEB 24 1969

United States Court of Appeals

For the Ninth Circuit

HARLAN P. HAMLOW and HENRY RAPOPORT,
Plaintiffs-Appellants.

SCIENTIFIC GLASS APPARATUS CORP., a corpora-
tion, and RINCO INSTRUMENTS COMPANY, INC.,
a corporation,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California

BRIEF FOR DEFENDANTS-APPELLEES

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No. 22,810

IN THE

United States Court of Appeals For the Ninth Circuit

HARLAN P. HAMLOW and HENRY RAPOPORT,
Plaintiffs-Appellants,

vs.

SCIENTIFIC GLASS APPARATUS CORP., a corpora-
tion, and RINCO INSTRUMENTS COMPANY, INC.,
a corporation,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California

BRIEF FOR DEFENDANTS-APPELLEES

INTRODUCTION

The parties will be referred to herein as "plaintiffs" or "defendants", as in the trial court. The plaintiffs are the appellants herein, and the defendants are the appellees.

For the Court's convenience, defendants will use the same record designation selected by plaintiffs, viz., "T." for the clerk's transcript or original papers filed in the District Court, and "R." for the reporter's transcript of the trial proceedings.

COUNTERSTATEMENT OF THE CASE

This is an action for the infringement of the single claim of the Hamlow and Rapoport patent No. 3,219,099.

“The patent in suit is directed to a rotary evaporator, which is a piece of laboratory equipment used in chemistry laboratories for evaporating liquids. In general, such rotary evaporators comprise a glass flask into which the liquid to be evaporated is placed. A hollow shaft having a tapered end fits into the flask in airtight engagement therewith. The other end of the shaft has an airtight rotary engagement with a stationary glass tubing which is connected to a source of low pressure such as a vacuum pump. In operation, the flask and shaft are rotated as a unit about the axis of the shaft so that the liquid in the flask will form a thin film on the inside of the flask. Heat is applied to the flask and the evaporated liquid is drawn off through the shaft and the stationary glass tubing.”

(Finding of Fact 14, T. 51.)

Rotary evaporators as just described were well known prior to plaintiff's invention. (Finding of Fact 15, T. 51.)

The history of rotary evaporators has a relatively recent origin, a rotary evaporator being first suggested in 1950 in an article by Craig. (Exhibit D.) In the Craig article, the hollow rotating shaft was made of glass and had one end thereof in airtight engagement with a glass flask. The other end of the hollow shaft and the stationary glass tubing were connected together by a ball-and-socket joint which was greased to make it airtight. Dr. Dreiding was questioned (R. 350-355) as to the construction of the Craig device with relation to the elements and limitations of the claim in suit. To summarize his testimony, the

claim is set forth below with those portions of the claim not found in Craig indicated in brackets and bold face print and with the italicized portions added to the claim to describe the Craig device. Dr. Dreiding testified that the Craig article (Exhibit D) is an:

“Apparatus for separating and removing volatile substances from a composition, in combination

a housing,

a shaft made of [**polyfluorovinyl resin**] *glass* rotatably mounted in said housing and with both of its ends extending beyond the limits of said housing,

said shaft having a passage of substantially uniform diameter extending axially through the entire length thereof,

said shaft having one end thereof removably securing a flask in airtight engagement for rotation therewith,

said shaft having its opposite end formed as the ball portion of a ball and socket joint,

a separately mounted glass fixed member, having an axial passage therethrough of substantially the same diameter

terminating with the socket portion of the ball and socket joint rotatably receiving and seating the said ball portion of said shaft in airtight [**self-lubricating**] engagement and with their respective passages in alignment,

exhaust means communicating with the passage in said fixed member connected to a source of low pressure, and

drive means mounted [**in**] outside said housing for rotating said shaft.”

As is abundantly clear, the difference between the claimed invention and the first prior art rotary evaporator is that *the Craig glass shaft with its ball member of a ball-and-socket joint on one end thereof has been replaced by a correspondingly shaped Teflon shaft*. This in turn changes the ball-and-socket joint from a greased glass-to-glass connection to a self-lubricating Teflon-to-glass connection.

(The Craig device also differs from the claimed invention in that the drive means, or motor, of Craig is *outside* the housing, rather than *inside*, as specified in the claim, but plaintiffs do not assert this to be a difference of any substance.)

Plaintiffs made this change for the following reasons. Glass-to-glass rotating connections, such as in the Craig device, require the use of a grease lubricant in order to obtain an airtight seal. However, the use of such grease can be undesirable because the grease will be exposed to and contaminate the substance inside the device which is being evaporated. (Patent in suit, Exhibit 1.) Plaintiffs wished to avoid the use of contaminating grease (R. 116) in their rotary evaporator and achieved this by using a Teflon shaft. With its Teflon-to-glass connections to the flask and fixed glass member, because a Teflon-to-glass connection is self-lubricating and requires no other lubricant to form an airtight seal (R. 21).

Plaintiffs also desired to prevent any contamination of the material being evaporated which might result from corrosion. Accordingly, their rotary evaporator was designed not to have any metal parts exposed to the material being evaporated. (R. 25.)

Plaintiffs' rotary evaporator does work. However:

“The combination of elements set forth in the claim of the patent in suit does not accomplish any result that is unusual, unobvious, surprising or unexpected. Instead, the results of such combination of elements are those which arise by virtue of the inherent properties of glass and Teflon and glass-Teflon combinations, which properties were well known at the time of the invention of the patent in suit.”

(Finding of Fact 27, T. 55.)

SUMMARY OF ARGUMENT

The main question presented here on appeal can be stated as follows:

Is it patentable invention to modify an old rotary evaporator by making the hollow shaft out of Teflon, instead of glass, in order to obtain the well-known advantages of Teflon?

The prior art shows plainly that it is not. After the original 1950 disclosure by Craig of a rotary evaporator, the prior art showed: the use of a Teflon-glass ball joint in a rotary evaporator (but not in a location designed to prevent contamination) with a recognition that it formed a self-lubricating airtight seal; the recognition that grease in a glass-to-glass connection could be a source of contamination and that this could be overcome by use of a Teflon-to-glass connection; the use of a Teflon-Teflon ball joint in a rotary evaporator (at the same location as in the patent in suit) to form a self-lubricating airtight seal; the construction of rotary evaporators without any metal parts therein that could be subject to corrosion.

The patent in suit shows merely an obvious assemblage of old concepts and elements to achieve expected results.

Further, the patent is invalid because of the public use of plaintiffs' devices at the University of California more than one year prior to the filing of the application.

There is no infringement here. In addition to the reasons assigned by the trial court, defendants do not make or sell the entire combination of elements set forth in the claim. There is no evidence that the entire combination has been used. Accordingly, there can be no liability for contributory infringement or for inducing to infringe, since there is no proof of direct infringement.

ARGUMENT

THE CLAIM OF THE PATENT IN SUIT DOES NOT MEET THE STATUTORY TEST OF VALIDITY SET FORTH IN 35 U.S.C. § 103.

Plaintiffs admit in their opening brief (page 11) that the "differences over the prior art do not appear to be giant strides". With this we agree. In view of the prior art here, we submit that the differences are virtually non-existent.

The principal prior art in this case is as follows:

The Craig rotary evaporator

Teflon-glass laboratory stopcocks

Buchler patent No. 2,865,445

The Hormuth (Bernauer) rotary evaporator

The Craig rotary evaporator

This device, Exhibit D, has already been discussed above. Again, the only difference between the claimed invention and Craig is the use of a Teflon (instead of glass) shaft with a self-lubricated Teflon-glass ball-and-socket joint. It should also be noted that the Craig device does not have any metal parts which are exposed to the inside of the device and which might be subject to corrosion.

The Craig article, Exhibit D, was not considered by the Patent Office.

Teflon-glass laboratory stopcocks

These devices are shown in the Birchall patent No. 2,876,985 (Exhibit A-6) and in the 1956 advertisements of Fischer & Porter Co. (Exhibits S and T). Findings of Fact No. 18 (T. 52) summarizes the teachings of these stopcocks:

“The prior art Birchall patent No. 2,876,985 shows a laboratory stopcock having a tapered Teflon plug fitting in a tapered glass seat and rotatable therein. The Birchall patent specifically recognizes that rotating glass-to-glass connections require the use of grease or other lubricants which can cause contamination of fluids passing therethrough and that such contamination can be avoided by the substitution of a Teflon plug in place of the previously used glass plugs. The Birchall Teflon-glass stopcock is airtight and self-lubricating. The advertisements for these Teflon-glass stopcocks (Exhibits S and T) stress the points that there is no product contamination resulting from the use thereof, and that such devices may be used over a wide range of temperatures.”

Thus, this prior art plainly teaches that contamination may result from a greased glass-to-glass connection, and that such contamination can be avoided by replacing one of the elements with Teflon.

Neither the Birchall patent nor the Fischer & Porter advertisements were considered by the Patent Office.

Plaintiffs attempt to avoid the disclosure of the Birchall patent by noting that it did not issue until some ten months after plaintiffs made their invention. This, of course, is true. Plaintiffs then argue, "Therefore regardless of what it shows it cannot speak as of the date of Plaintiffs' invention which was April 24, 1958 * * *. Accordingly, it cannot be relied upon to invalidate the patent in suit under § 103". (Opening brief, page 30.)

No authority is cited for this statement of law. This is not surprising, because the statement is absolutely incorrect.

In the first place, the Birchall patent issued on March 10, 1959, over two years before plaintiffs filed their application. As such, the disclosure of the Birchall patent may be considered in determining whether or not the present patent in suit discloses an unobvious improvement, even if the Birchall invention was made after plaintiffs' invention. *Application of Foster*, 343 F.2d 980 (CCPA, 1965), cert. den. 383 U.S. 966 (1966).

In the second place, the application for the Birchall patent was filed on June 22, 1955, almost three years before plaintiffs' 1958 date of invention. In *Hazeltine Research Co. v. Brenner*, 382 U.S. 252 (1965), the Supreme Court ruled specifically that a patent speaks as of its

filing date and is part of the “prior art” at that time as that term is used in 35 U.S.C. § 103. Accordingly, the Birchall patent is prior art here for all purposes.

(It is noted that plaintiffs also dispose of the Ueberwasser patent No. 3,034,573 on the ground that it was based upon a French patent which issued in 1959 after plaintiffs’ 1958 date of invention and that “therefore it cannot speak with respect to anything obvious at the time Plaintiffs made their invention, as required under § 103”. (Opening brief, page 31.) However, the Ueberwasser patent No. 3,034,573 was filed on March 28, 1958, *before plaintiffs’ invention*. Accordingly, under the specific ruling of *Hazeltine*, the Ueberwasser patent is prior art under § 103.)

It may be that plaintiffs’ complete misunderstanding of the law on the applicability of prior art is the chief reason why this appeal has been pursued.

Plaintiffs also assert that laboratory stopcocks do not “relate to rotary evaporators and must therefore be considered non-analogous art” (Opening brief, p. 30.)

This contention is manifestly incorrect. Plaintiffs’ Exhibit 9 is a catalog sheet for plaintiffs’ commercial rotary evaporator. The front cover has a photograph of the rotary evaporator set up for operation, with two stopcocks being used. The price list on the rear of Exhibit 9 shows that the \$214.78 price for the apparatus includes a stopcock, and that for \$3.95 additional a “stopcock with Teflon plug instead of glass” will be supplied. If plaintiffs sell a Teflon plug stopcock with their rotary evaporator, how can they now assert that such stopcocks are “non-analogous”?

Furthermore, Dr. Rapoport, one of the co-inventors of the patent in suit, testified:

“Q. How long have you known of the use of stopcocks with Teflon plugs?

“A. Oh, ten years I would say.

“Q. That would take you back to 1957 or so?

“A. Yes.”

(R. 118.)

* * *

“Q. What is the purpose of using a Teflon plug in a stopcock?

“A. To avoid lubricant that you would use if you had a glass on glass, that you would need if you had glass on glass.

“Q. Did you realize this back in 1957?

“A. Yes, this is well known.

“Q. Would that prevent contamination of products passing through the stopcock?

“A. Yes.

“Q. The same as in your device it prevents contamination of fluid passing through the Teflon shaft because there is no grease; is that correct?

“A. If the materials do not react with Teflon, and most materials do not, then there would not be any contamination from a Teflon plug in a glass barrel type stopcock.

“Q. Teflon is Teflon, is it not? The Teflon that would be used in the stopcock is the same material as the Teflon used in your rotary evaporator?

“A. That would be my assumption.”

(R. 121-122.)

Buchler patent No. 2,865,445

This patent to a rotary evaporator was considered by the Patent Office, and discloses a ball-and-socket rotary joint in which the ball member 29 is glass and the socket member 30 is Teflon. The Buchler patent states with reference to this Teflon-glass ball joint:

“* * * member 30 may consist of plastic material, preferably tetrafluoromethane polymer (‘Teflon’) which has been found to give a smooth yet airtight seal against glass; the highly passive surface of this material, which appears to the touch as though coated with a film of oil, enables its use without any sealing compound when applied against a smooth-surfaced object.”

The Buchler patent was considered by the Patent Office. However, this patent does not discuss the problems of contamination in rotary evaporators and does not use the self-lubricating Teflon-glass ball joint for the prevention of contamination.

In 1954, when the Buchler patent was filed, it may be that Buchler did not recognize that lubricating grease could be a source of contamination in laboratory equipment or that his self-lubricating Teflon-glass ball joint could be used to avoid such problems. However, this concept was certainly recognized by Birchall in 1955 and was well known by 1957. (R. 121.)

The Hormuth (Bernauer) rotary evaporator

Many of the exhibits in the present case pertain to the rotary evaporator developed by Dr. Bernauer of Switzerland and manufactured by L. Hormuth Company of Germany.

The earliest prior art exhibit relating to this device is the German Gebrauchsmuster (utility model) No. 1,752,622 (Exhibit R), entered September 19, 1957 to L. Hormuth Company. The drawing from this patent is in Appendix C of plaintiffs' opening brief.

The Hormuth rotary evaporator has a hollow glass shaft g mounted for rotation with its lower end and making a tapered connection with the glass flask. A Teflon member h makes a non-rotating tapered connection to the upper end of the glass shaft g, and the upper end of the Teflon member h forms a ball received within the socket portion of fixed Teflon member j. Thus, the rotating ball joint of the Hormuth evaporator has a Teflon-to-Teflon contact. There are no metal parts subject to corrosion by the material being evaporated.

The next prior art reference to the Hormuth evaporator is found in the 1958 Houben-Weyl publication. (Exhibit P and translation, Exhibit P-1.) In a discussion of the operation of a rotary evaporator having a glass-to-glass ball-and-socket rotary joint, the Houben-Weyl publication states:

"An apparatus which, because of its simplicity, is very useful for the laboratory in the rotary evaporator." The principle is shown in Fig. 5.

"The liquid is evaporated from the round bottom flasks and can be added continuously from a dropping funnel. The flask b is rotated so that a thin layer of liquid with a large surface is formed. This film evaporates at a suitable temperature without boiling. *The weakest point is the balljoint bearing c as indicated by numerous suggestions for improvement in the literature. More recently the balljoint is made of*

*Teflon, which gives a tight joint and needs no lubrication.*²

²According to a private communication from K. Bernauer, Institute of Chemistry of the University of Zurich, this evaporator is manufactured in Germany by the firm of L. Hormuth, Propr. W. E. Vetter, Heidelberg, and in Switzerland by the firm of A. Dumas, Zurich." (Emphasis added.)

Exhibit Q is a printed brochure of the Hormuth evaporator which was printed prior to August of 1859. (Finding of Fact 19 (T. 53).) This publication shows a photograph of the Hormuth rotary evaporator and states:

"Teflon-Ball joint connection

Between the intensity condenser and the rotating glass parts; tight without lubrication—resistant to high temperatures and to chemical reagents."

The Hormuth rotary evaporator has also been used in this country more than a year prior to the filing date of the patent in suit, as set forth in Finding of Fact 20 (T. 53):

"In the summer of 1959, Dr. Michael P. Cava, then a Professor of chemistry at Ohio State University, Columbus, Ohio, was at the University of Zurich in Zurich, Switzerland. While there, he saw in Dr. K. Bernauer's laboratory a rotary evaporator as described in Finding No. 19, and arranged for the purchase of one of such evaporators from the L. Hormuth Company. Such evaporator was received by Dr. Cava at Ohio State University no later than January of 1960. Such evaporator was as shown and described in the German Gebrauchsmuster No. 1,752,622 (Exhibit R) and the L. Hormuth brochure (Exhibit Q). This Hormuth evaporator was put to public use at Ohio State University more than one year prior to the

August 11, 1961 filing date of the patent here in suit. The Hormuth evaporator was used extensively for a period of several years. Dr. Cava recognized that the use of grease or other lubricant could result in product contamination and for that reason no such contaminating grease or other lubricant was ever used on the Teflon ball joint connection or the glass shaft-to-flask connection of the Hormuth evaporator."

The trial court compared the Hormuth rotary evaporator with plaintiffs' device and found as follows in Finding of Fact 21 (T. 54):

"The Hormuth evaporator, illustrated and described in Exhibits P, Q and R, and used at Ohio State University, is an evaporator in which there are no metal parts in contact with the fluids therein and is accordingly corrosion-free, and also is a rotary evaporator in which no contaminating grease or other lubricant was used. Such evaporator fulfills the functions that were stated by plaintiffs to be new in their rotary evaporator at pages 44, 45 and 66 of the file wrapper of the patent in suit (Exhibit K)."

Although the Hormuth evaporator uses a ball joint in which both members are made of Teflon, whereas the patented device uses a ball joint in which one member is Teflon and the other is glass, the trial court found that a Teflon-glass ball joint "is the full equivalent of the Teflon-Teflon ball joint of the Hormuth evaporator insofar as its use in a rotary evaporator is concerned." (Finding of Fact 22, T. 54.)

Thus, there are three *different* ways in which the Hormuth rotary evaporator forms a part of the prior art. It has been patented in 1957 (Exhibit R), it has been dis-

closed in publications printed in 1958 (Exhibit P) and 1959 (Exhibit Q), and it has been in prior public use in this country by Dr. Cava (Finding of Fact 20).

THE GERMAN GEBRAUCHSMUSTER NO. 1,752,622 IS A PATENT OF A FOREIGN COUNTRY WITHIN THE MEANING AND INTENT OF 35 U.S.C. §§ 102(a) AND 102(b) AND IS PRIOR ART IN THIS ACTION TO BE CONSIDERED IN A DETERMINATION OF OBVIOUSNESS UNDER 35 U.S.C. § 103.

As plaintiffs correctly point out, there is no holding in this Circuit that a German Gebrauchsmuster is a patent within the meaning of § 102. Neither is there a holding to the contrary. The matter simply has not come up before this Court.

However, this matter has been considered elsewhere.

On November 2, 1965, Volume 820, Number 1, of the Official Gazette of the United States Patent Office (Exhibit Y) stated:

“German Utility Model (Gebrauchsmuster)

As Reference

“The German law, in addition to the regular patent law, provides for short term exclusive rights in new articles of manufacture (processes and compositions of matter being excluded) which might be of a lower order of inventive merit than is required for the longer term patent. These go by the name of ‘Gebrauchsmuster’ which word is customarily translated as ‘utility model’ and might also be translated as ‘useful article.’ They are issued without search and the specifications and drawings, while available to the

public, are not issued in printed form. Since copies are not placed in the Examiner's search files, questions relating to their use have been infrequent. Recent events, however, have so increased the probability of a German Gebrauchsmuster coming to the attention of the Examiner that a general statement as to their status and use appears desirable.

* * *

"Inasmuch as the full specifications are not issued in printed form, they cannot be used as printed publications, in conformity with decisions of the courts and of the Patent Office that manuscript specifications of issued patents and of applications laid open for public inspection, are not printed publications.

"*Prior patents.*—The Examiners may use the Gebrauchsmuster, however, as a prior patent, effective as of the date of registration, in the same manner as they would use the patents of countries which do issue specifications in printed form; for example, as they may use a Spanish or South African patent which has been brought to their attention, or a Belgian patent for the period of several years after it is granted and before the specification is issued in printed form.

* * *

"Section 901.05(b) is amended by adding the following after the second paragraph on page 139:

"German Utility Models (Gebrauchsmuster) may be used as references as prior patents, but not as prior printed publications, effective as of their registration date. When necessary, the Librarian will obtain the complete text of the specification from the German Patent Office. A file of such copies is maintained in the Scientific Library.

"Richard A. Wahl,
Assistant Commissioner."

German Gebrauchsmusters have also come under judicial scrutiny in *American Infra-Red Radiant Co. v. Lambert Industries, Inc.*, 8 Cir. 1966, 360 F.2d 977 at 991 through 994. The court discussed in great detail the nature and effect of a German Gebrauchsmuster and concluded that:

“* * * It is an important part of the German patent system. It has all of the attributes normally attributed to a patent which include an application setting forth claims, protection granted by the Government for a limited time, a right of action in the inventor to protect the invention against infringement, notice to the public in an official publication, and availability to the public of the specifications and claims. Furthermore, the Gebrauchsmuster falls within the general definition of ‘patent’ in that it does command a sovereign grant of right of exclusive use for limited periods.”

The Court then held that a German Gebrauchsmuster is a foreign patent within the purpose of 35 U.S.C. § 102 (d). Since there is no difference between §§ 102 (a), 102 (b) and 102 (d) in language, each referring to an invention “patented * * * in * * * a foreign country”, the reasoning of *Infra-Red* applies equally to each section. We submit that this Court should so hold and rule that a German Gebrauchsmuster is a foreign patent within the meaning of §§ 102(a) and 102(b).

Such a ruling would thus establish the German Gebrauchsmuster No. 1,752,622 as prior art. Since the date of this patent is in 1957, prior to any date of plaintiffs’ invention, it would obviously be prior art under § 103.

**THE CLAIM OF THE PATENT IN SUIT IS PLAINLY OBVIOUS
IN LIGHT OF THE PRIOR ART.**

As set forth above, the difference between the claimed subject matter of the patent in suit and the 1950 Craig device (Exhibit D) is that Craig uses a glass shaft with a greased glass-to-glass ball joint, whereas the patent in suit uses a Teflon shaft with a self-lubricating Teflon-to-glass ball joint.

In 1954 (the filing date), Buchler used a Teflon-glass ball joint in a rotary evaporator to obtain a self-lubricating airtight seal.

In 1955 (the filing date), Birchall knew that grease in an all-glass stopcock could result in contamination and that this could be eliminated by replacing the glass plug with a Teflon plug. This concept and expedient was well known by Dr. Rapoport and others by 1957.

In 1957, the Hormuth evaporator used an all-Teflon ball joint in a rotary evaporator, at the same point as such ball joint is located in the patent in suit, to give an airtight joint without lubrication. This was also pointed out in 1958 in the Houben-Weyl publication (Exhibit P). A Teflon-Teflon ball joint is the full equivalent of a Teflon-glass ball joint insofar as their use in rotary evaporators is concerned.

Thus, plaintiffs did not invent the basic combination. Craig did. They did not discover that grease in a glass-to-glass joint could cause contamination and that this could be avoided by making a Teflon-to-glass joint. Birchall did. They did not invent a self-lubricating Teflon-glass ball joint. Buchler did. They were not even the first to use a self-lubricating ball joint using a Teflon member at

the upper end of the shaft. The Hormuth evaporator was the first.

Neither were plaintiffs the first to invent a corrosion-and-contamination-free rotary evaporator.

“The Hormuth evaporator, illustrated and described in Exhibits P, Q and R, and used at Ohio State University, is an evaporator in which there are no metal parts in contact with the fluids therein and is accordingly corrosion-free, and also is a rotary evaporator in which no contaminating grease or other lubricant was used. Such evaporator fulfills the functions that were stated by plaintiffs to be new in their rotary evaporator at pages 44, 45 and 66 of the file wrapper of the patent in suit (Exhibit K).”

(Finding of Fact 21, T. 54.)

What, then was left for plaintiffs to invent? In their opening brief they suggest that their invention is unobvious because their Teflon shaft extends down and makes a tapered Teflon-to-glass connection with the glass flask. However, if this is their invention they do not even claim it. The claim states only that the shaft has “one end removably securing a flask in airtight engagement for rotation therewith.” This does not specifically define a tapered Teflon-to-glass joint.

Even if the claim had defined such a specific structure, Birchall shows a tapered Teflon-to-glass joint in a stop-cock. The Hormuth evaporator shows a tapered Teflon-to-glass joint between the Teflon ball joint member h and glass shaft g.

As is plain, the patented device is a completely obvious assemblage of well-known parts to obtain well-known results. Nothing unexpected or unusual has been achieved.

“The combination of elements set forth in the claim of the patent in suit does not accomplish any result that is unusual, unobvious, surprising or unexpected. Instead, the results of such combination of elements are those which arise by virtue of the inherent properties of glass and Teflon and glass-Teflon combinations, which properties were well known at the time of the invention of the patent in suit.”

(Finding of Fact 27, T. 55.)

In light of these disclosures of the prior art the trial court found (Findings of Fact 24, 25 and 26, T. 55):

“24. In view of the prior art in this case, and particularly the Hormuth evaporator and the Birchall patent, it would have been obvious to one of ordinary skill in the laboratory apparatus art at the time of the invention of the patent in suit to use self-lubricating Teflon-glass members in order to achieve an airtight joint and to avoid contamination which would result from the use of grease or other lubricants that might be required in a corresponding glass-to-glass joint.

“25. In view of the teachings of the prior art, and in particular of the Hormuth evaporator and the Birchall patent, it would have been obvious to one of ordinary skill in the laboratory apparatus art at the time of the invention of the patent in suit to substitute a Teflon shaft for the glass shaft of Craig (Exhibit D) so that such shaft would make a tapered Teflon-to-glass connection with the flask (as in Birchall) and would have a ball joint connection to the stationary glass tubing (as in Hormuth), in order to provide for a non-corrosive evaporator having self-lubricating connections.

“26. In view of the teachings of the prior art, and particularly in view of Craig, Hormuth and Birchall,

it would have been obvious to one of ordinary skill in the laboratory apparatus art at the time of the invention of the patent in suit to make a non-corrosive and lubrication-free rotary evaporator as set forth in the claim of the patent in suit.”

These findings are manifestly correct and the determination that the patent is invalid as obvious should be here sustained.

THE PRIOR PUBLIC USE OF THE HORMUTH ROTARY EVAPORATOR BY DR. CAVA INVALIDATES THE PATENT UNDER 35 U.S.C. §102(b).

As was found by the court below, in Finding of Fact 20 (T. 53):

“In the summer of 1959, Dr. Michael P. Cava, then a Professor of chemistry at Ohio State University, Columbus, Ohio, was at the University of Zurich in Zurich, Switzerland. While there, he saw in Dr. K. Bernauer’s laboratory a rotary evaporator as described in Finding No. 19, and arranged for the purchase of one of such evaporators from the L. Hormuth Company. Such evaporator was received by Dr. Cava at Ohio State University no later than January of 1960. Such evaporator was as shown and described in the German Gebrauchsmuster No. 1,752,622 (Exhibit R) and the L. Hormuth brochure (Exhibit Q). This Hormuth evaporator was put to public use at Ohio State University more than one year prior to the August 11, 1961 filing date of the patent here in suit. The Hormuth evaporator was used extensively for a period of several years. Dr. Cava recognized that the use of grease or other lubricant could result in product contamination and for that reason no such

contaminating grease or other lubricant was ever used on the Teflon ball joint connection or the glass shaft-to-flask connection of the Hormuth evaporator.”

Such prior public use is a bar to a patent issued on an application filed more than one year later, under 35 U.S.C. § 102(b), whether the patent be to the same exact thing or to obvious improvements thereon which add nothing of a patentable nature.

Cataphote Corporation v. De Soto Chemical Coatings, Inc., 356 F.2d 24, 27 (9th Cir. 1966);

Tool Research and Engineering Corp. v. Honcor Corp., 367 F.2d 449 (9th Cir., 1966).

“ * * * Likewise where an article is sold, there is a sale or public use of the article itself and of all improvements on the thing which would be obvious to one skilled in the art. * * * ”

It is quite plain that the physical differences between the patented and Hormuth rotary evaporators are indeed trivial and minor and add nothing which was patentable. The ungreased self-lubricating Teflon-glass ball joint of the patent is the full equivalent of the Hormuth ungreased self-lubricating Teflon-Teflon ball joint of Hormuth. The Teflon member h of Hormuth makes a tapered connection with glass shaft g which in turn is connected in airtight and ungreased engagement with the glass flask, whereas in the patent the Teflon shaft makes an ungreased tapered connection with the glass flasks.

Stated in a different way, the difference between the Hormuth and patented devices is that in the patented device the Teflon member h of Hormuth is made longer so that it connects directly with the flask.

As is the patented device, the Hormuth evaporator is an evaporator in which there are no metal parts in contact with the fluids therein and is accordingly corrosion-free. As with the patented device, the Hormuth evaporator used no contaminating grease or other lubricant. The Hormuth evaporator fulfills all functions that were stated by plaintiffs to be new in their rotary evaporator during the prosecution of their patent. (Finding of Fact No. 21, T. 54.)

The lengthening of the Teflon member h of Hormuth to connect directly to the flask, and the substitution of an equivalent Teflon-glass rotary ball joint for the Hormuth Teflon-Teflon rotary ball joint are obvious variations of the Hormuth device.

Accordingly, the prior public use in this country of the Hormuth rotary evaporator invalidates the claim of the patent in suit.

**THE MOST PERTINENT PRIOR ART WAS NOT
CONSIDERED BY THE PATENT OFFICE.**

The statutory presumption of validity of the patent in suit is clearly overcome in this case.

In plaintiffs' opening brief, at page 7, it is stated that "nearly all of the art relied upon herein was present and considered" by the Patent Office and that "the only alleged reference which was not considered by the Patent Office and which is here relied upon both in the trial court's decision and by Defendants, is the so-called Bernauer Gebrauchsmuster."

These statements are completely incorrect.

The Craig publication (Exhibit D) is relied upon in Findings of Fact 17, 25 and 26.

The Birchall Teflon-glass laboratory stopcock (Exhibits A-6, S and T) is relied upon in Findings of Fact 18, 24, 25 and 26.

The Houben-Weyl publication (Exhibit P) and Hormuth brochure (Exhibit Q) are relied upon in Finding of Fact 19.

The prior public use of the Hormuth rotary evaporator is relied upon in Finding of Fact 20.

The pertinence of these prior art patents, publications and uses have already been discussed. The trial court was clearly correct in Finding of Fact 28 (T. 56) that:

“The Craig publication (Exhibit D), the Hormuth rotary evaporator (Exhibits P, Q and R, and the use thereof at Ohio State University) and the Birchall patent No. 2,876,985 (also advertisements thereof, Exhibits S and T) were not considered by the Patent Office during the prosecution of the patent in suit, and are much more pertinent than the prior art which was considered by the Patent Office.”

**PLAINTIFFS' PATENTED DEVICE WAS IN PRIOR PUBLIC USE
AT THE UNIVERSITY OF CALIFORNIA.**

The court held that plaintiffs' rotary evaporator had been in public use at the University of California more than one year prior to the August 11, 1961 filing date of the application for the patent in suit. (Findings of Fact 29, 30, 31 and 32, T. 56.)

Plaintiffs challenge this holding on the basis of this Court's decision in *Cataphote Corporation v. De Soto*

Chemical Coatings Inc., 356 F.2d 24 (9th Cir., 1966), *Tool Research v. Honcor*, 367 F.2d 449 (9th Cir., 1966), and *Super Mold v. Clapps Equipment*, 397 F.2d 932, 158 USPQ 527 (9th Cir., 1968), wherein patents were held invalid under 35 U.S.C. 102(b). Plaintiffs state at page 23 of their opening brief:

“* * * In each instance there was substantial proof of prior public *commercialization* to support the findings. Here there is none * * *”

By inference plaintiffs seem to suggest that there can be no prior public use unless such use was commercial. If this is their position, it is just as incorrect as their understanding of the applicability of the prior art.

The leading case on this point is *Egbert v. Lippmann*, 104 U.S. 333, 26 L. Ed. 755 (1881), wherein the inventor of a corset spring made a gift of the device to a friend who used it for several years before the inventor applied for his patent. This was held to be a public use and invalidated the patent.

“We remark, secondly, that, whether the use of an invention is public or private, does not necessarily depend upon the number of persons to whom its use is known. If an inventor, having made his device, gives or sells it to another, to be used by the donee or vendee, without limitation or restriction, or injunction of secrecy, and is so used, such use is public, within the meaning of the statute, even though the use and knowledge of the use may be confined to one person.”

Tool Research and Engineering Corp. v. Honcor Corp., 367 F.2d 449 (9th Cir., 1966.)

“* * * One sale or gift of an article is sufficient to constitute a sale or public use. * * *”

In *Randolph v. Allis-Chalmers Mfg. Co.*, 264 F.2d 533 (7th Cir., 1959), a mechanic for Pure Oil Company made and installed resilient seats on tractors owned by Pure Oil, which tractors were then used by Pure Oil without limitation or restriction and with the approval and full knowledge of the mechanic. More than two years later (the statutory period then), the mechanic filed an application for patent on the resilient seats. It was held that there was a prior public use by Pure Oil of the invention and the patent was invalidated.

Plaintiffs also attack the holding below of prior public use on the basis that the use of the invention at the University of California was merely experimental within the meaning of *Elizabeth v. Pavement Co.*, 97 U.S. 126; 24 L.Ed. 1007 (1877).

A review of the evidence in the present case shows clearly that plaintiffs' rotary evaporator was in prior public use and that such use was not experimental.

Plaintiffs' rotary evaporator with its Teflon shaft was first conceived by them sometime in early 1958.

Pursuant to a request by Dr. Hamlow, a rotary evaporator using a Teflon shaft was built at the University of California in Berkeley in April, 1958 (R. 31), but this particular device was not successful. (R. 32.)

In May, 1958, another device was built at the University of California (R. 35) which embodied all of the elements of the claim of the patent in suit. (R. 39.) This device was tested and the results were "very satisfactory and very exciting." (R. 35.)

Dr. Hamlow put it to use in his research work (R. 94), which he was performing towards his thesis (R. 96), and it satisfactorily performed the functions required by his research. (R. 40.)

Another model of the same design was built a year later in April, 1959, because plaintiffs wanted to see if it would perform as well as the previous one. It did (R. 40-41), and Dr. Hamlow continued to use both in his research. The earlier device has been in continuous use, and was still in use at the time of the trial (R. 91).

The door to Dr. Hamlow's laboratory was kept locked, but graduate students had keys and access to the laboratory. (R. 93.)

In the two years from May, 1958, these rotary evaporators proved very satisfactory for Dr. Hamlow's work. (R. 96.)

Some time prior to March, 1960, Dr. Hamlow described the rotary evaporator to Dr. Rapoport's seminar group of 12 graduate students (R. 94) and there was an interest and anxiety on their part to acquire these instruments for their use (R. 94). There was no injunction to secrecy given to these students about the rotary evaporator.

Following the seminar, Dr. Rapoport decided to have more of these devices made and given to more distant graduate students to give the devices the worst experimental tests in their laboratory work that could be conceived. (R. 42-43.)

Forty-nine more rotary evaporators were made and completed by March 9, 1960. (R. 98.) Dr. Rapoport told the graduate group that the evaporators were now avail-

able for distribution and that anybody who wanted one could come and get one to use in their work. (R. 99.) The students were to report to Dr. Rapoport at the end of the month as to their operation. (R. 43.) The students began to use these evaporators in April, 1960. (R. 99.)

By the end of the month Dr. Rapoport spoke specifically to these students, and none of them reported that they were unsatisfactory. (R. 99.)

After the end of the tests, Dr. Rapoport concluded that “* * * this was it. We had in our hands the best rotary evaporator that was around. With such an impressive instrument, the decision was that we should go ahead and make it available to others doing chemical research as well.” (R. 44.)

Practically all of the evaporators given out to these students have been in continuous use up to the time of trial. (R. 91-92.)

Drs. Hamlow and Rapoport set up Chemquip Company to sell these rotary evaporators, with the first sale being made to Stanford University in November, 1960. (R. 46-47.)

The present commercial model of plaintiffs is essentially the same as the forty-nine devices given to the students, except that it is a “slicker model”, “painted and parts have been covered so that they are not exposed. The working principle and the working parts are essentially the same.” (R. 44.)

The application was filed on August 11, 1961, over 15 months after the forty-nine rotary evaporators were distributed to the students for their use.

Under these facts it is plain that the use of the forty-nine rotary evaporators by the graduate students at the University of California was a "prior public use" under the meaning of 35 U.S.C. § 102(b).

Plaintiffs, however, contend that the use of these devices by the graduate students was merely "experimental" until some time after the critical date August 11, 1960 (one year before the application was filed). At this point we should bring out that the rotary evaporators were used by the graduate students in their regular experiments, just as plaintiffs' commercial devices are used in laboratory experiments. The "experimental" use allowed under § 102(b) means such use as is made with an end towards perfecting the invention or towards an ascertainment of whether the invention has been perfected. Once these have been established, further use is not "experimental."

Taking the evidence as favorably to plaintiffs as possible, any "experimental" use of the invention ended one month after the forty-nine rotary evaporators were distributed to the students, and put into use in April 1960, for it was by this time that they all reported to Dr. Rapoport that the evaporators were satisfactory. The continued use of the evaporators by the students was clearly public use thereof.

Looking at the evidence more realistically, Dr. Hamlow had been using the rotary evaporators in his own research for about two years from May 1958 and they proved very satisfactory for his work. (R. 96.) After this long usage, 49 of the devices were made and distributed to the students to use in their work. It is hard to believe

that plaintiffs would commit the University to the expenditure necessary to make 49 rotary evaporators if plaintiffs were not satisfied that these devices would work as well as they had up to that time.

It should also be borne in mind that these devices are not complicated. They have a rotating Teflon shaft, a glass flask at one end and a fixed glass member at the other. Some time may be required to see if such a device will work, but it is difficult to see that more than the two years' use by Dr. Hamlow was required for this purpose. Particularly is this so in view of the fact that the original 1958 design was never changed and was still in use at the time of trial.

The record fully supports the finding that the 49 rotary evaporators were in public use before August 11, 1960.

THERE IS NO INFRINGEMENT IN THE PRESENT CASE.

Throughout their opening brief (at pages 10, 14, 32 and 33), plaintiffs charge Dr. Dreiding's firm with producing its "Vapsilator" as a "Chinese copy" of the structure and combination of elements of the claim in suit. There is no basis for this accusation of copying. In plaintiffs' opening statement it was stated (R. 8):

"Now, the defendants in making the Vapsilator one has to admit that they are a person skilled in this art. Instead of copying and following the teachings of the prior art, they followed the teachings and copied plaintiffs' device. I think that we can readily show that they were not following the prior art but following what we taught."

Towards the end of the trial, the Court remarked (R. 340):

“There is no cloud on the record because of the opening statement because there is no evidence of copying at least to this point of trial.”

No evidence of copying was later introduced by plaintiffs. Instead, plaintiffs put into evidence an agreement dated September 4, 1966 wherein defendants were to be the distributors in this country of the accused Vapsilator (Exhibit 16.) This agreement was in existence before the patent in suit ever issued. The existence of the accused Vapsilator prior to the issuance of the patent certainly refutes plaintiffs' charges of copying.

On the question of infringement, the Court found as follows (Findings of Fact 33, 34 and 35, T. 57):

“33. The accused ‘Vapsilator’ device is advertised for use with a recommendation that a thin film of silicone lubricant be used at the Teflon-glass ball joint. Such recommendation is made to help eliminate the production of Teflon shavings that are produced in a rotary Teflon-glass ball joint which Teflon shavings can result in contamination of the products in or passing through the device.

“34. There was no evidence of any use of the accused ‘Vapsilator’ device in the United States without the use of the recommended thin film of silicone lubricant.

“35. The accused ‘Vapsilator’ when used with the recommended thin film of silicone lubricant has a ball joint which is not self-lubricating and is thus substantially different in manner of operation and result achieved as compared to the apparatus claimed by the claim of the patent in suit.”

These are findings of fact, and thus the "clearly erroneous" rule applies, F.R.C.P. 52(a).

The evidence is undisputed that the accused "Vapsilator" device is advertised for use with a recommendation that a thin film of silicone lubricant be used at the Teflon-glass ball joint. (Exhibit 2.) There is no evidence that it was ever used in the United States without the use of the recommended thin film of silicone lubricant.

Dr. Rapoport testified that if a thin layer of silicone lubricant is used at the ball joint of the accused device there would be contamination of the product passing through the device (R. 114), and if it could only be so used it would not be in accordance with plaintiffs' invention (R. 115). If the accused device is used with lubricant, Dr. Rapoport didn't know whether it would come within the scope of the invention. (R. 116.)

The findings of fact are not clearly erroneous and fully support the judgment of non-infringement.

Additionally, even though the court below declined to pass upon the point, there is another ground for non-infringement in this case.

The claim requires that there be "a source of low pressure" to which the exhaust means is connected. In other words, "a source of low pressure" is an element in the claim.

Although the accused device is intended to be used with a source of low pressure, there is no testimony or evidence that the accused device was sold by plaintiffs or anyone else with a source of low pressure, or that the accused device was ever used with a source of low pres-

sure. As a consequence, there is no proof whatsoever that the claim has been directly infringed. *Nelson v. Batson*, 322 F.2d 132 (9th Cir., 1963.)

35 U.S.C. 271(c) provides that a seller of a device constituting a material part of the invention, knowing the same to be especially made for use in an infringement of the patent, shall be liable as a contributory infringer. Even if it be assumed that the provisions of 35 U.S.C. 271(c) apply here, it is well established that "there can be no contributory infringement in the absence of a direct infringement." *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 341 (1961).

Since no direct infringement has been proven in the present case, defendants' sales of the accused device cannot be acts of contributory infringement. Plaintiffs will probably contend that this is quibbling on defendants' part, but the burden of proof was on plaintiffs to prove infringement. This they have not done.

The same is true with respect to "inducement" of infringement under 35 U.S.C. 271(b). There can be no liability for inducing infringement unless there has been an infringement. *Aluminum Extrusion Company v. Soule Steel Company*, 260 F.Supp. 221, 224 (D.C. C.D. Calif., 1966.)

CONCLUSION

The judgment below is well founded both in fact and in law and should be affirmed in all regards.

Dated, San Francisco, California,

December 3, 1968.

Respectfully submitted,

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No. 22,810

In the

FEB 24 1969

United States Court of Appeals
For the Ninth Circuit

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Plaintiffs-Appellants,

vs.

SCIENTIFIC GLASS APPARATUS CORP., a Corporation, and RINCO INSTRUMENT COMPANY, INC., a Corporation.

Defendants-Appellees.

Plaintiffs-Appellants Reply Brief

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Defendants-Appellees.

Plaintiffs-Appellants Reply Brief

Plaintiffs have received and studied the Brief filed by Defendants-Appellees. Three impressions are inescapably derived from a reading of the Brief:

1. The extent of the quotations from printed exhibits;
2. The extensive quotations from, and reliance upon the so-called Findings of Fact which have been fabricated by Defendants according to their own desires; and
3. Castigation of Plaintiffs counsel for the lack of knowledge of the law.

Only those matters directed to the issues in this case will be responded to.

THE FINDINGS OF FACT

The so-called Findings of Fact are literally the fabrication of Defendants attorneys. The actual and complete extent of the consideration given to this case by the trial court is set forth in the decision (R 509-511) which is set out in full in Appendix B of Plaintiffs Opening Brief. The shallowness and the limitations of this decision are plainly apparent. The trial court made it abundantly clear that nothing other than that which was stated was considered. Accordingly, everything else in the so-called Findings of Fact is solely the manufacture of Defendants attorneys in the effort to mold the decision to their own uses and purposes. Plaintiffs, of course, objected to these Findings (T 39) but without avail, and the Findings were signed without even so much consideration as a hearing. It is, therefore, submitted that this is not the kind of Findings contemplated by Rule 52 F.R.P.C. as they are not the Judge's Findings even by adoption. They are certainly not the kind of Findings which warrant consideration by this Court, or which can be relied upon in determining the rights of the parties on this appeal. A great portion of Defendants Brief is devoted to quotations from their own Findings and in relying so heavily upon them, Defendants are merely echoing their own biased views.

Possibly, Defendants considered that since Plaintiffs lost the case, everything should be "sock it to them". The Findings do reflect this attitude, but such a situation is not warranted here. Judgment was for Plaintiffs under 35 U.S.C. § 101 and 116 (R 447). It was not even true in the decision referred to in Appendix B. For example, the only basis for holding non-infringement was "the apparent required use of lubricant" (R 510; See Opening Brief pp 10, 11 and 15). In this connection, the trial court did not hold that a source of low pressure or vacuum was not in the Vapsilator, as Defendants claim (Reply Brief p 32). What was actually held is plainly stated (R 510-511).

"MR. MOORE: Your Honor, about the point of low vacuum source. That was another contention that we stated, avoided infringement because the claim calls for and there is no proof.

THE COURT: I think that it is fairly implicit in the advertising that the court could draw an inference that there is a low vacuum source.

MR. MOORE: There is no question that the device if used is to be so used but there is now proof that it has been so used. That is my point.

THE COURT: I do not think I am ready to so find in that respect."

The so-called Findings of Fact go far beyond, and are therefore Defendants extrapolations of the terse limits of the decision. Beyond those limits, the Findings are merely self-serving statements. Plaintiffs assert there is no substantial testimony to support these Findings.

INFRINGEMENT HAS BEEN PROVED

Under the heading of infringement, Defendants take Plaintiffs to task for stating that Dr. Dreiding's Swiss company in producing its "Vapsilator", produced a structure which is a Chinese copy of the combination of elements in Plaintiffs claim. They dally with this Court not only as a matter of semantics, but by taking a statement of counsel from the Opening Statement and treating it as evidence. In Plaintiffs Opening Brief, it was stated that the "Vapsilator" produced by Dr. Dreiding's Swiss Company is a Chinese copy of Plaintiffs claim (pp 2, 10, 32, 33). Plaintiffs have interpreted this to this Court as a statement that Defendants deliberately copied Plaintiffs apparatus. This we do not know and never asserted, besides, it is a matter of morality. Plaintiffs are not concerned with morality at this point, but only the facts, and the facts are that the Defendants "Vapsilator" is a structure which does

not follow any of the prior art, but which does precisely and exactly copy the structure and function of the elements of the claim in suit. This is a controlling circumstance. (See Opening Brief pp 14-20).

On page 31 of Defendants Brief, they point out that copying was impossible because the Agreement for distribution of "Vapsilators" in this country, dated September 21, 1965, (Plf Ex 16) was in existence prior to the issuance of Plaintiffs patent. This is nonsense. It is the unrefuted testimony that Plaintiffs equipment, following the disclosures of the patent in suit, were placed on sale November 1960 (R 46), which is some five years prior to the Agreement to which Defendants refer. There was ample time in which Defendants could have obtained Plaintiffs rotary evaporator prior to the manufacture of the "Vapsilator".

Infringement is so evident, particularly in view of the admissions of Defendants. (Opening Brief pp 15-16) that one wonders if Defendants can really be serious in pressing the point of non-infringement. There is no evidence to support any Finding directed to non-infringement.

INVALIDITY HAS NOT BEEN ESTABLISHED

The Craig Apparatus Fails to Anticipate or Make Plaintiffs Invention Obvious.

In the Reply Brief, the Craig device (Def Ex D) is relied upon to a very large extent, but only as interpreted by the obviously biased testimony of its financially interested witness, Dr. Dreiding (Brief p 3)—supplemented by their own concocted Findings (Brief p 2). The sophistry of Dr. Dreiding's testimony is exemplified in his cross-examination (R 419-425). Perhaps a fair and unmistakable way to demonstrate the misleading character of Defendants argument, is to picture both the Craig device and the device of the claim in suit. (See structures reproduced along side)

In the Craig apparatus, A is a flask with an elongated neck C which releases into the interior of the flask B at right angles to the

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ware, is non-analogous art. The fact that stopcocks are used in a laboratory does not teach the subject-matter of rotary evaporators, or any other piece of apparatus which may or could be used in a laboratory. Whether art is analogous or not is determined on the basis of structure. On the basis of the structure shown on the Birchall patent and the advertisements of Fischer & Porter Co. (Def Ex S and T), Plaintiffs submit that this is indeed non-analogous art. Whether it is or not, is really not of prime importance because the Birchall patent is not a disclosure of or a teaching which would make the subject-matter of Plaintiffs rotary evaporator obvious to one having ordinary skill in this art. Defendants assertion is not the equivalent of proof, and they offered no proof to support this assertion.

The glass seat of the stopcock is sloping or conical in shape. The Teflon plug is frusto conical in shape in order to conform with the angle of the seat. The very nature of Teflon, which presents a slippery surface, would cause the plug to slip out of engagement. Of and by itself, it could not remain in its seat as was customary when glass plugs were used. The Patentee Birchall himself says that it is an object of his invention to continuously urge the plug into wedging engagement within the seat by a steady pull of a compression spring or other means applied to the end of the plug axially thereof. The whole teaching of the Birchall patent is a structure for maintaining the Teflon plug on its seat by means of compression devices externally thereof (R 133) Therefore, the teaching of Birchall applied to Plaintiffs invention would be that if the tapered glass neck of a flask 34 were to be coupled to the taper 32 of Plaintiffs Teflon shaft 31, then the flask could not be held tightly thereon without some external means for continuously urging the same into the wedged engagement. No such teaching was or can be used in the apparatus of Plaintiffs claim. One of the unexpected benefits which

were achieved by Plaintiffs invention was the fact that this engagement remained air tight without external means, and in spite of differences in the co-efficients of expansion and contraction between the glass flask 60 and the Teflon shaft 31 (R 130). Since Birchall could teach nothing useful for rotary evaporators, it can hardly be considered the "most pertinent art".

The clincher is that when Dr. Dreiding was asked on cross-examination whether or not a serious study of the Birchall patent revealed anything like Plaintiffs rotary evaporator (Plf Ex 22), he said there was nothing in the Birchall patent "remotely resembling it" (R 432). This would seem to end any claim that Birchall taught anything which would make Plaintiffs invention obvious under 35 U.S.C. § 103.

It is therefore clear that not only is the Birchall patent not a teaching under 35 U.S.C. § 103 which would defeat the patentability of Plaintiffs claim, but that it was not the most pertinent art, so that the failure of the Patent Office to mention it does not defeat the presumptive validity of Plaintiffs claim.

The Deposition of Dr. Cava Is Useless to Destroy Plaintiff's Patent.

Apparently, Defendants rely upon the deposition of Dr. Cava of Wayne State University (Detroit, Michigan) to invalidate Plaintiffs patent. Any reliance upon the deposition of Dr. Cava is tantamount to the denial of the right of Plaintiffs to cross-examination. Time and again, Dr. Cava made statements from "memory" under the prodding of Defendants counsel. Defendants well know, that there should have been some supporting evidence to confirm facts and dates supposedly testified to by Dr. Cava. Time and again, Dr. Cava was asked upon cross-examination, to produce *any* supporting data of *any* kind. Each time he could not do so. He finally admitted that he had nothing whatever to support what he had said (R 293, 294, 232, 234, 236, 241, 248) and that he was not a mechanic (R 224) so his memory of equipment

was not good. He had no independent memory of the Bernauer apparatus (R 229). He did, however, have files (R 220). Defendants did not call anyone from either Ohio State University or Wayne State University who could have given supporting evidence that they saw the equipment or that Dr. Cava had brought it in or anything which could give credence to his memory. Nothing like this was done. No shipping documents, no photographs, no written records of any kind were offered in support of Dr. Cava's asserted dates. The Hormuth brochure on the Bernauer equipment (Def Ex Q) bears no date, and no proof was ever offered to make this a publication of probative value.

Furthermore, Dr. Cava was obviously indebted to his friend and mentor Dr. Dreiding. He continually, in the deposition, protested his lack of interest and bias loudly and, at times, vociferously (R 232, 239, 247, 221, 289). "Methinks he doth protest too much".

So far as Plaintiffs are advised, the trial court placed no credence whatever in Dr. Cava, or his deposition. Certainly nothing concerning him is referred to in the decision. Here is another example where Defendants prepared Findings on matters which were not included in the decision of the trial court.

Most important of all is that Dr. Cava could not place the date of his use of the Bernauer equipment accurately in 1959 or 1960 (R 232). If the use was actually after August 11, 1960, then it was too late to be useful to Defendants. Clearly this testimony does not conform with the standards required to defeat a valid U.S. patent.

Not only is there no proof by Defendants that the Bernauer Gebrauchsmuster and equipment are the same as that called for in Plaintiffs claim, but the evidence is all to the contrary.

Defendants Have Not Sustained Their Burden of Proof of Prior Public Use.

If Defendants rely to any extent on the deposition of Dr. Cava to show public use of the invention through the Bernauer apparatus, then this attempted proof fails for two reasons: *First*, there is no showing that the Bernauer apparatus is the same in structure as called for by Plaintiffs claim; and *Second*, that this deposition is wholly unreliable and uncorroborated to any degree.

This leaves only the use of Plaintiffs apparatus by the 12 graduate students of Dr. Rapoport at the University of California at Berkeley. This is a question of fact and the only facts are those which are found in the record, amounting to some eleven pages (See Opening Brief p 20). Plaintiff submits that these facts, under the law, do not establish public use.

Defendants rely upon *Egbert v. Lippmann* 104 US 333; 26 L Ed 755 (1881). In this case the criteria used by the Court was whether the inventor had "given or sold" the product of the invention to a third person. There is no question that these 49 machines were not sold. Equally, there can be no doubt that the apparatus was not given to the graduate students. These machines were at that time and always have been the property of the University of California (R 99). The use was not without limitation: the apparatus was for use only in the private laboratory of each graduate student on the premises; under Dr. Rapoport's direction and control (R 43); each such student was required to give a full report of the operation of his apparatus to Dr. Rapoport (R 43) which was quite independent of the work on the graduate thesis (R 97).

There was no "sale or gift" of this apparatus as there was in *Tool Engineering v. Honcor* 367 F2d 449; 151 USPQ 236 (9th Cir. 1966).

Defendants rely upon the time when an apparatus was "perfected" as the date when public use starts. This is not the criterion, and Defendants cite no authority in support of this phantasy* Dr. Rapoport was wise enough to realize that the reports of one of the inventors (R 42) was not sufficient testing in order to release the apparatus to the public, and that further testing was required (R 100). Testing by his graduate students was decided upon because of the scope of projects amongst them and because it could be wholly controlled by him. There should be no penalty for being thorough and sure before a product is sold in commerce and indeed the law does not impose such a penalty. The whole purpose of experimental use in the law is to provide the inventor with a reasonable testing period. That is all that was done here, as demonstrated by the testimony of Dr. Rapoport.

**Elizabeth v. Pavement Co.* 97 U.S. 126; 24 L.Ed. 1000 (1877) makes it plain that no changes or improvements have to be made: (p. 135)

"And though, during all that period, he may not find that any changes are necessary, yet he may be justly said to be using his machine only by way of experiment;"

CONCLUSION

In spite of arguments pro and con, several facts stand above all else.

- (1) Infringement has been proved beyond doubt.
- (2) Defendants admit that no patent or publication cited by them teaches or discloses Plaintiffs invention.
- (3) Defendants have not sustained the burden of proof of prior public use.
- (4) Defendants only witness and expert has a very substantial financial interest in the outcome of this litigation.
- (5) Plaintiffs invention was not obvious even to Plaintiffs expert skilled in this art who is familiar with all of the art relied upon.
- (6) Defendants commercial machine is a Chinese copy of the structure of Plaintiffs claim and therefore does not follow the prior art on which Defendants now rely to defeat Plaintiffs claim.
- (7) Plaintiffs products made under the claim in suit have had great commercial success.

If Plaintiffs claim, which is here in suit, is of sufficient importance for Defendants to identically follow, over everything else known in this art, it must be apparent that Plaintiffs have made a substantial contribution and that the decision and judgment of the trial court must be reversed.

Respectfully submitted,

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No. 22,810

In the
United States Court of Appeals
For the Ninth Circuit

HARLAN P. HAMLOW and HENRY RAPOPORT,
Plaintiffs-Appellants,

vs.

SCIENTIFIC GLASS APPARATUS CORP., a Corporation, and RINCO INSTRUMENT COMPANY, INC., a Corporation.
Defendants-Appellees.

Plaintiffs-Appellants Brief

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Infringement

1. The holding of non-infringement cannot be sustained because infringement by Defendants* in the manufacture and sale of the "Vapsilator" Rotary Evaporator, has virtually been conceded, and has been thoroughly proved.

2. Infringement is not avoided because of a recommended use of the equipment in a non-infringing manner where the equipment

*Plaintiffs are Appellants here, but the parties will be designated in this Brief as they were in the trial court.

itself embodies and duplicates the precise structural elements of the claim in suit, and operates in the same way for the same purpose. Furthermore, infringement is not avoided because no actual *use* without lubricant was proved. Any *manufacture* or *sale* is infringement under 35 USC § 271(a).

Validity

3. The single claim of the patent in suit is not invalid and void under 35 USC § 102(b) because it was not in public use in this country more than one year prior to the date of the application for the patent in suit. The testing of 49 devices at the University of California was not a public use defeating validity of the patent in suit. Further, there is no anticipation of the claim of the patent in suit under 35 USC § 102.

4. The single claim of the patent in suit is not invalid and void under 35 USC § 103 because the differences between the subject matter of said claim and the prior art are such that the subject matter as a whole would not have been obvious at the time of the invention to a person having ordinary skill in this art, as required under 35 USC § 103. The teachings of the German Gebrauchsmuster Registration, supplemented by those of the Birchall and Buchler patents, do not invalidate the claim of the patent in suit.

5. The single claim of the patent in suit is for a combination of elements and this combination is not invalid because they do in fact produce unusual, surprising and unexpected results. In this connection, Plaintiffs may rely on features and advantages not set forth in the original filing.

6. If a German Gebrauchsmuster Registration may be considered prior art in the determination of obviousness under 35 USC § 103, which Plaintiffs do not concede, then this foreign Registration is available only to the extent which is apparent on the face of the document and without explanation or extrapolation.

7. On the basis of the record herein, the statutory presumption

of validity of the patent in suit and the single claim thereof has not been overcome. A German Gebrauchsmuster Registration was not a patent of a foreign country within the meaning and intent of 35 USC § 102(a) and 102(b) at the time the application for the patent in suit was pending, and therefore the presumptive validity is unaffected by this unpublished German Registration.

8. The Bernauer evaporator said to have been in use at Ohio State University does not represent a public use in this country more than one year prior to the filing date of the application for the patent in suit as it is wholly unproved and vague as to structure and time of use, and is wholly without confirmation or corroboration. For the same reasons it is not available as prior art under 35 USC § 103. Additionally and for the same reasons, the alleged modifications are not available to Defendants for any purpose.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

This is a patent infringement suit brought by the Plaintiffs, Dr. Harlon P. Hamlow and Dr. Henry Rapoport (T 48),* against Scientific Glass Apparatus Corp., a California corporation, a seller of the alleged infringing equipment (T 48), Rinco Instrument Company, Inc., an Illinois corporation, the importer of the equipment (T 50), operating under the exclusive license from the manufacturer, Chemophor Zurich, a Swiss company (T 51), which voluntarily appeared and agreed to be bound by the results of this trial just as if it were an original party (R 68, T 51). Chemophor Zurich openly and actively assumed the entire control and management in the defense of this litigation (T 51). Dr. Andre Dreiding, a Swiss citizen and half owner of Chemophor Zurich (R 297, 376), was the only witness for

*Throughout this Brief, T will be used to designate the Transcript of Record and R will be used to designate the Court Reporter's Transcript.

Defendants at the trial. The trial court held the patent in suit invalid and not infringed. This decision was given from the bench at the conclusion of the trial (R 509-510). The suit was brought under the patent laws of the United States, Title 35 USC § 281 and Title 28 USC §1338. Defendants counter claim is based upon Title 28 USC §§ 2201 and 1338(a) (T 48). This Court has appellate jurisdiction under Title 28 USC § 291. Defendants filed a Cross appeal with respect to the taxing of costs but the same has been voluntarily dismissed by Defendants in this Court. There is no contention with respect to jurisdiction (Plf Ex 12, p 6).

STATEMENT OF THE CASE

The patent in suit, No. 3,219,099 (T 6), is directed to a Rotary Evaporator which is a relatively small piece of scientific laboratory equipment. The patent issued with a single claim on November 23, 1965 to Plaintiffs, Dr. Harlon P. Hamlow and Dr. Henry Rapoport (T 48). Rotary evaporators are of recent origin and were first suggested in 1950 in an article by Craig et al (R 348). Defendants witness Dr. Cava stated they were not common even in 1959 (R 230). This was corroborated by Dr. Rapoport (R 24). Rotary evaporators have now become a necessary piece of apparatus in practically all phases of chemical analysis. Defendants expert, Dr. Dreiding readily stated (R 321):

"According to our standards I would say very frequent use. This is the kind of equipment one uses a great deal in a laboratory which, of course, is the reason why there has been so much development activity in this field * * *"

The rotary evaporator uses thin layer evaporation to separate the desired residue from aqueous and other solutions (R 82-83). The thin layer is accomplished by the rotation of a spherical glass flask which spreads the solution over a large area on the inside of the flask even when small volumes are used. It is

apparent that this provides a condition for rapid evaporation. The equipment is operated under vacuum so that the temperatures used for evaporation are kept to a minimum. It is axiomatic that even the slightest contamination in the operation of the equipment which could contact either the solution or the vapors, would distort and destroy the accuracy of the work (R 25, 215, 180, 284, 320, 448). The work of the prior investigators as exemplified by the plethora of patents and publications produced by Defendants herein, (Appendix A), talented and distinguished as they were, had not produced a rotary evaporator with an air tight rotating joint without the use of a lubricant. No one denies that lubricants and corrosion are contaminants (R 25, 180, 215, 280, 284, 320, 448).

For the proper operation of a rotary evaporator there are two joints or connections of primary importance (R 399, 449, 455). These are (1) the rotating joint or connection between the rotating parts and the stationary take off parts i.e. the ball and socket joint and (2) the joint or connection where the evaporating flask is attached and detached to the rotating member. As long as these joints or connections are vacuum tight and non-contaminating, they will function properly (R 35). It is apparent that the rotating connection is continually moving during operation. The flask must be attached and removed at the beginning and finish of each operation (R 137). It is these two joints or couplings which are of primary importance in this litigation.

In 1957 Drs. Hamlow and Rapoport were confronted with a great need for a rotary evaporator which was air tight and free of contamination (R 24-25). To their knowledge, no such equipment was available (R 25). They analyzed the problem (R 23) and concluded that such a rotary evaporator had to have general and universal usefulness (R 20-21) which incorporated (a) the handling of thin films of material in either batch or continuous operation, (b) accomplished the evaporation at all use-

ful ranges of temperatures, (c) required no lubricated joints or couplings causing contamination, (d) would not react with the material being treated, also causing contamination, (e) could be readily assembled and disassembled, (f) had a minimum of parts and (g) was not a single purpose piece of equipment but which could readily be coupled for use with other standard laboratory equipment. This is what Drs. Hamlow and Rapoport set out to accomplish and this was what resulted in the patent in suit (R 25, 55). Plaintiffs rotary evaporator as claimed is just such a piece of equipment (R 35).

The apparatus of the patent in suit and its operation can best be explained and epitomized by reference to the patent drawing reproduced in Appendix C at the end of this Brief. It is perhaps not an over simplification to state that the apparatus is made up of three principal parts. *First*, beginning at the bottom of the drawing, is the spherical glass flask 60. This flask has a standard tapered glass neck 34 (R 18). *Second*, a Teflon rotating shaft 31 with a male taper 32 at the lower end which couples within the neck 34 of the flask 60 making a glass to Teflon coupling (R 21). Since the Teflon shaft is rotated by the motor 14, it is apparent that the glass flask rotates with the shaft 31 (R 20). And *third*, a stationary glass take off member 36 which terminates at its lower end in a semi-spherical glass socket 37 which mates with the rotating semi-spherical ball portion 33 of the Teflon shaft 31 to form a Teflon-to-glass rotating coupling (R 21-22). The Teflon shaft 31 is a new element in this art (R 84, 85, 54). Teflon as a material is unique. It is substantially self-lubricating so that no lubricants are required. It can be machined to close tolerances like metal, and yet it is chemically inert. It has this last characteristic in common with glass. The Teflon-to-glass coupling of the flask 60 is air tight without lubricant (R 21) and separates easily without the hazard of freezing together (R 53-54). The coupling between the stationary

glass socket 37 and the rotating Teflon ball portion 38 of the shaft is air tight without a lubricant (R 21). The vacuum or low pressure source is shown at 65 and supplies the vacuum for the operation of the equipment. The Teflon shaft with the Teflon to glass contacts at both ends is new to this art (R 89, 84, 85, Plf Ex 4). It is readily admitted by Defendants that there is nothing in the prior art either by patent or publication which teaches a rotating Teflon shaft with Teflon to glass couplings at both ends, air tight with no lubricant needed (R 407, 353, 410).

The patent in suit was not issued without a struggle. All of the claims were rejected in the Patent Office and an appeal to the Board of Appeals was taken by Plaintiffs with the result that because of the novelty and the absence of any teaching of a rotating Teflon shaft with Teflon to glass air tight lubricant free couplings at both ends, the single claim in suit was allowed (Plf Ex 4).

In the Patent Office (Def Ex K) and before the Board of Appeals (Plf Ex 4) nearly all of the art relied upon herein by Defendants was present and considered. The two principal patents relied upon by the Patent Examiner were Buchler (Def Ex A-5) and Ueberwasser (Def Ex A-7, A-8, R 56) were considered and the claim allowed over these patents (T 9).

The only alleged reference which was not considered by the Patent Office and which is here relied upon both in the trial court's decision and by Defendants, is the so-called Bernauer Gebrauchsmuster (Def Ex R, R-1) which is a German Registration of a Utility Model. It is Plaintiffs position that the Gebrauchsmuster is not a patent within the meaning of the statute, and certainly is not a prior publication, and as such cannot defeat patentability of the claim in suit. Also, that the failure of the Patent Office to cite this German Registration does not destroy the *prima facie* validity of the patent in suit, because at the time Plaintiffs patent application was before the Patent Office, a Gebrauchsmuster was

not considered a prior reference, or a prior patent (Def Ex Y). According to Defendants own exhibit (Def Ex Y), the Patent Office did not change its practice with respect to Gebrauchsmuster Registration until 1965, which was after the allowance of Plaintiffs patent.

It is the testimony here that Dr. Bernauer in Zurich, Switzerland had been investigating rotary evaporators and trying to improve them and was joined by Dr. Dreiding, Defendants expert and only witness, to complete the structure of the Bernauer German Gebrauchsmuster (R 299). On numerous occasions during his testimony, Dr. Dreiding stated that he and Dr. Bernauer developed the equipment shown in the Gebrauchsmuster (Def Ex R, R-1) (R 300, 309, 319, 396, etc.). At no time in any of the published documents in evidence is there any reference to Dr. Dreiding in connection with this development, which goes to the veracity of this witness. It is Plaintiffs conviction that even if the Bernauer Gebrauchsmuster is considered for any purpose, it is not structurally within the claim of the patent in suit and therefore cannot in any event anticipate, or teach the combination of the claim here in suit.

Defendants offered the deposition of Dr. Cava of Wayne University (R 163) in the effort to establish the presence of a Bernauer rotary evaporator in the United States just prior to the critical date of Plaintiffs invention. Dr. Cava's obvious indebtedness to Dr. Drieding (R 165, 220-226, 325-326, 377) and his loyalty to him, remove any credibility to his testimony. Dr. Cava had no independent memory of this equipment (R 236, 229.) Also, Dr. Cava was unable to substantiate even the slightest detail of the dates which he asserted with any documents which could in any way give credence to his deposition (R 293, 229, 231, 232, 234, 236). However, his testimony is almost entirely with respect to Bernauer rotary evaporator, which, as stated above does not teach, disclose, or describe the inventive combination of the claim in suit.

In spite of all of the large number of alleged prior art references placed before the trial court, not any of it taught the combination of the claim in suit as will be demonstrated. (See Appendix D) Dr. Dreiding had the key portion of the combination of the claim directly before him in his investigations on this very subject, and yet neither he nor Dr. Bernauer recognized it (*Infra* p. 32). What is now said to be obvious by Defendants, was not obvious to their own experts at the time this invention was made by Plaintiffs.

The trial court held that the combination was obvious under 35 USC § 103 and this is factually and legally unsupportable.

Defendants urged, and the trial court held, that the patent in suit was invalid under 35 USC § 102(b) on the ground of prior public use (R 509). The testimony shows the use of approximately 49 rotary evaporators made in accordance with the elements of the claim in suit (R 49), for a period of about five months prior to the critical date, which equipment was distributed by Dr. Rapoport (R 43) for use by his graduate students in their investigations looking toward a doctors degree in chemistry, for the sole purpose of testing the durability and operation of the equipment (R 100) under the severest kinds of circumstances (R 42-43). Prior to this time, the only testing of the equipment had been by Dr. Hamlow (R 41, 42, 100). Plaintiffs assert that this is not the kind of use which invalidates a meritorious patent, and that the evidence does not support the findings or conclusions that there was a prior public use which would warrant a holding of invalidity.

As has been stated earlier, the claim of the patent in suit is for a combination of some eleven elements. Of these eleven elements all but four were conceded by the Defendants to be incorporated in the alleged infringing structure, the "Vapsilator." (R 65) At the trial after Plaintiffs had proved the precise identity of the structure of the "Vapsilator" with that of the elements of the claim in suit, Defendants then conceded that all but one of the elements were incorporated into the "Vapsilator" (R 73, 127,

128) and with respect to this the structure of the element was not denied, but only the operating condition denied (R 75). They denied that the juncture between the Teflon shaft and the fixed glass socket at the upper end of the equipment was self-lubricating (R 75-76) because the brochure *recommended* the use of a lubricant. Such a recommendation is merely a semantic maneuver (R 115). Where all of the elements of the combination claimed are present in the infringing structure, merely a recommendation for an inferior or improper operation does not avoid infringement. Defendants accordingly have tacitly admitted infringement.

It is to be remembered that Defendants only witness, Dr. Dreiding from Switzerland (R 296), testified with respect to the alleged prior art offered by Defendants. He claimed personal knowledge and participation in the development of rotary evaporators since 1955, and led the trial court to believe that this prior art taught the subject matter of the claim in suit. However, when his own company (R 297, 376) came to build the infringing structure, the "Vapsilator" in Switzerland in 1965, ten years later and four years after Plaintiffs had had their machine on the market (R 46), Dr. Dreiding's machine did not follow the teachings of the prior art, but rather incorporated every single detail of structure and operation of Plaintiffs equipment.

The questions which the trial court refused to face up to were: if the combination of elements claimed by the patent in suit was so obvious, why did not someone other than the Plaintiffs do it? Admittedly no one else did (R 407-410). Also, if the prior art devices worked completely satisfactorily to teach and disclose the structure and combination of Plaintiffs claim, then why did Dr. Dreiding's firm produce its "Vapsilator" as a "Chinese Copy" of Plaintiffs' claim, rather than following the prior art with which he was thoroughly familiar.

The answers to these two questions alone demonstrate that the holdings of invalidity and non-infringement by the trial court must be reversed.

SUMMARY OF ARGUMENT

The claim of the patent in suit is a combination claim of old and new elements. The invention, of course, resides in this unique organization as a whole, which is more than the sum of the parts.

Infringement by Defendants product, the Vapsilator, was virtually admitted, partly during the pretrial and the remainder during the trial. It was abundantly proved that it uses the complete combination of elements of the claim in the same organization and operates in precisely the same way for the same purposes. The holding of non-infringement cannot be sustained. The infringement is not avoided by a "recommendation" for a less efficient use of the equipment, as the normal use would be precisely that of the patent in suit. It is the manufacture and sale of the equipment which is the infringement under 35 USC § 271(a).

The question of validity is a sophisticated matter and requires study of the art and the application of the rules. The invention here is an important one, although the differences over the prior art do not appear to be giant strides. As so often happens, great changes come about in almost imperceptible increments and become apparent only when the new combination satisfies the needs of those involved. The defense of invalidity was based upon 35 USC §§ 101, 102, 103 and 116. Judgment was given to Plaintiffs in connection with § 101 and § 116. (R 447).

The defense, under § 102 centered around 2 issues: first, a German Gebrauchsmuster covering a development of Dr. Bernauer, a Swiss investigator, and registered to L. Hormuth, the manufacturer of the Bernauer equipment. There is no holding in this Circuit that a German Gebrauchsmuster Utility Model Registration is a patent within the meaning of § 102. In no event is it a printed publication under § 102. Accordingly, the Gebrauchsmuster is not a proper reference in this case. Furthermore, at the trial Defendants readily admitted that the Gebrauchsmuster did not contain the elements called for in the claim of the patent in

suit and did not operate in the same way to accomplish the same results. Accordingly, there can be no anticipation by this Utility Model Registration. Therefore, there can be no anticipation under § 102 because the devices must be identical in structure and operation.

Second, under § 102(b) the trial court stated there was a prior public use of plaintiffs' invention by graduate students operating some of these machines more than one year prior to the filing date. The evidence showed clearly that this was merely a testing use and factually well within the legal and permissible uses and of the decisions and did not constitute a prior public use. This holding of prior public use is not supported by the facts or the law.

The main defense of invalidity appears to rest on the ground of obviousness under 35 USC § 103. One has to remember that anything becomes obvious after it has been done, and that in applying the rules and tests, obviousness is to be determined as of the date of the invention, which was April 1958. The manner of determining obviousness was set forth by the Supreme Court in *Graham v. John Deere*, 379 US 956; 148 USPQ 459 at 467 (1966). The Ninth Circuit has been successful in carefully following the rules laid down for determining obviousness.

The prior art referred to in the testimony here shows that glass-to-glass joints between the flask and the shaft were common and well known. Glass-to-glass rotary ball joints were also well known. Teflon-to-Teflon rotary ball joints were also known. Only in Plaintiffs patent is there taught glass-to-Teflon tapered joint in rotary evaporators and only in Plaintiffs patent is it taught that the Teflon-to-glass ball joint, which is self lubricating and contamination free. Plaintiffs patent taught the all Teflon rotating shaft with a uniform continuous central passage. It is these new features combined with the old ones which made Plaintiffs rotary evaporator the success which it instantly became. Defendants cited a plethora of prior art in the attempt to invalidate Plaintiffs

patent on the ground of obviousness. (See Appendices A and D). The Court relied upon only three, the German Bernauer Utility Model Registration, the Birchall patent for stopcocks, and the Buchler patent. During the course of the testimony, Defendants expert, Dr. Dreiding, was asked to point out the patent and/or publication closest to the invention of the claim in suit. The Bernauer Utility Model Registration was the one selected. Defendant admitted that no prior patent or prior publication showed the combination of Plaintiffs claim. The Bernauer Utility Model did not, as was readily admitted by Defendants, contain the novel features of Plaintiffs combination. It did not teach anything which would make applicants novel combination obvious. In fact, it taught quite the contrary. The Bernauer Utility Model Registration specifically states that a Teflon-to-Teflon rotary ball joint is essential to make it operate. There is nothing in it which would teach an all-Teflon rotating shaft. Thus, the main item of prior art does not contain, or teach, or disclose the possibility of Plaintiffs combination. The trial court's perfunctory statement that the Buchler patent shows a contamination-free Teflon-to-glass joint is simply not true. It does show a Teflon-to-glass plus metal joint at one part in the apparatus, but neither Defendants nor anyone else claims that this was contamination free. This was one of the principal references in the Patent Office and Plaintiffs claim was allowed over it. The Birchall patent related to stopcocks of glass with Teflon plugs. It is obvious that a stopcock cannot in any manner teach the combination of a rotary evaporator. Since a requirement is that the prior art must as of the date of invention, show the combination of Plaintiffs claim to be obvious, it is apparent that the prior art relied upon in no way supports this conclusion. Individual elements of the prior art cannot be selected to form a synthetic structure which never existed, in the effort to show invalidity. Furthermore, commercial success is an element for consideration. There is no question but that Plaintiffs products

manufactured under the patent in suit had a phenomenal commercial success without any sales program and without any salesmen. There is no evidence to the contrary.

One of the greatest compliments an infringer can pay to the patent in suit is to design the infringing instrument as a Chinese copy of the claim in suit. This is precisely what the Defendants did. Dr. Dreiding, who was Defendants only witness, and expert, and who owned a substantial interest in the company manufacturing the infringing Vapsilator device in Switzerland, designed the infringing Vapsilator to combine all of the elements of the claim in suit and did not in any respect follow the prior art which he relies upon so strongly to invalidate Plaintiffs patent. If the prior art was sufficient to invalidate the claim of the patent in suit, then it would be the equal or better than that of the combination claimed. Obviously it was not. Furthermore, both Dr. Dreiding and Dr. Bernauer were men highly skilled in this art. They produced the Bernauer structure. In so doing, they had before their very eyes the germ of Plaintiffs invention and yet it was not obvious to these highly skilled men. If Plaintiffs' invention was so obvious from the prior art, then why did not Dr. Bernauer and Dr. Dreiding produce it? The simple fact remains that only Plaintiffs did. It is apparent that the differences between the organization of elements in the claim here in suit was not obvious from the prior art at the time of Plaintiffs invention in April of 1958. The defense of invalidity cannot therefore be sustained, in fact, or in law, and the patent is clearly valid.

ARGUMENT

Infringement Is Clear and Unequivocal

The trial court, at the conclusion of the trial, held from the bench (R 510) that there was no infringement of the combination of elements set forth in the single claim of the patent in suit, and gave as the reasons (R 510)

"the apparent required* use of the lubricant at the connection in the ball and socket as recommended and because of the lack of evidence of the lack of necessity of such lubricant at those points."

Not only is there no evidence to support the holding of non-infringement, but the reasons ascribed are wholly without factual or even plausible support.

In Defendants admissions (Plf Ex 12 p 2-4) and in the Findings of Fact (T 49), it was held that the single claim of Plaintiffs' patent was a combination claim divided into eleven elements, the separate elements of which Plaintiffs have lettered (a) to (k) inclusive, as follows: (See also Appendix D)

	"Vapsilator" Structure
Apparatus for separating and removing volatile substances from a composition, in combination	admitted
(a) a housing,	admitted
(b) a shaft made of polyfluorovinyl resin	admitted
(c) rotatably mounted in said housing and with both of its ends extending beyond the limits of said housing	admitted
(d) said shaft having a passage of substantially uniform diameter extending axially through the entire length thereof	present (R 66,70, 123)
(e) said shaft having one end thereof removably securing a flask in airtight engagement for rotation therewith	admitted
(f) said shaft having its opposite end formed as the ball portion of a ball and socket joint	admitted
(g) a separately mounted glass fixed member.....	admitted

*The word which Defendants used was "recommended" (Plf Ex 2, R 114). There is no testimony to the effect that lubricant was required, but quite the contrary.

"Vapsilator"
Structure

- | | |
|--|---------------------------|
| (h) having an axial passage therethrough of substantially the same diameter | present
(R 71-73) |
| (i) terminating with the socket portion of the ball and socket joint rotatably receiving and seating the said ball portion of said shaft in airtight self-lubricating engagement and with their respective passages in alignment | present
(R 74-77, 125) |
| (j) exhaust means communicating with the passage in said fixed member connected to a source of low pressure, and | present
(R 77-80, 127) |
| (k) drive means mounted in said housing for rotating said shaft | admitted* |

*See Defendants Statement R 73 and Stipulation R 127-128.

In answer to the Plaintiffs' Interrogatories directed to infringement (Plf Ex 12, p 2) Defendants admitted, and as embodied in the Pre-Trial Order (T 24) also admitted, that their apparatus, known as a "Vapsilator" (Def Ex AA) was accurately shown and described in their catalog sheet (Plf Ex 2). It was admitted also that Defendants were engaged in the manufacture, sale and distribution of the "Vapsilator." Defendants admitted that all of the eleven elements (a to k) of the claim were precisely identical with those of the "Vapsilator" except for four elements (R 65) e.g. (d) (R 66, 70, 123), (h) (R 71, 73), (i) (R 74-77, 125), and (j) (R 77-80, 127). (See also Plf Ex 12, p 2-4). At the trial, (R 66), and under pressure of cross examination, Defendants conceded (R 127-128) that each of these excepted elements of the claim were in fact present in exactly the same form and structure in Defendants apparatus except element (i), and as to this structure, i.e., the Teflon-to-glass ball and socket joint, the structure was not denied, but only that this structure was not *self-lubri-*

cating engagement (R 76). Infringement was virtually conceded by Defendants. The testimony of Dr. Rapoport was clear and unequivocal, in spite of Defendants' denials, that each of the elements of the combination claim was exactly found in the "Vapsilator," (R 65-80). Each of the elements of the "Vapsilator," as in the claim of the patent in suit, performed their same functions in the same way to accomplish the same result, (R 61, 81). There were not substitutes or equivalents. The "Vapsilator" having the same combination of elements set forth in the claim and operating in the same manner for the same purposes and having been sold in this jurisdiction, is infringement under 35 USC § 271. There is no evidence to the contrary.

In *Wahl v. Carrier* 358 F(2) 1; 148 USPQ 698 (7th Cir—1966) the Court held: (p 702)

"Those findings establish that the Carrier feeder includes each and every element of those patent claims and uses the same principle of operation—a deliberate and controllable vibration of the auger during its rotation, in the combination of such claims—to produce the identical results in the same manner as disclosed by the patent in suit. The Carrier feeder is therefore an infringing device. *Binks Manufacturing Co. v. Ransburg Electro-Coating Corp.*, 7 Cir., 281 F.2d 252, 258, 126 USPQ 318, 324; *Briggs v. M & J Diesel Locomotive Filter Corp.*, 7 Cir., 342 F.2d 573, 580, 144 USPQ 701, 707."

In *Ashlock v. Atlas—Pacific* 225 F Supp 205, 139 USPQ 421 (1963) the Court held: (p 433).

"The Defendant's pitting machines each amount to a combination and arrangement of mechanism which produces the same effect and in substantially the same way as the combination and arrangement of the mechanism of Claim 11, and defendant's pitting machines are infringements of Claim 11."

As to the reasons given for the holding of no infringement, the Court referred to the language shown on the double spread of

Plaintiffs' Exhibit 2, and enlarged in Plaintiffs' Exhibit 21. These words under Point 2 are, "We recommend a thin layer of silicon lubricant" (R 114). There was no question but that lubricants can be used in the Teflon-to-glass ball and socket joint (R 342), but that such lubricant would be a contaminate (R 114) and destroy the accuracy of any work being done (R 448, 441, 215, 284). The use of lubricant does not destroy the air-tight engagement. The words of Defendants brochure do not state that the operation of the "Vapsilator" should never be without the use of a lubricant, or anything to the effect that a lubricant is required to be used in the "Vapsilator." Certainly, no purchaser of this equipment interested in accurate results would ever follow this recommendation knowing full well that the Teflon-to-glass rotating ball joint would result in an air-tight self-lubricant engagement without lubricant contamination (R 89, 284, 342, 215, 320).

Furthermore, the recommendation is inconsistent with, and contradictory to other statements in the "Vapsilator" brochure (R 115). In paragraph 4, it states the operation is clean and that *only* the solvent is in contact with glass and Teflon. This could not be true if a lubricant were used. The recommendation cannot be taken seriously in view of this statement (R 115). The recommendation of the leaflet is obviously a red herring intended as a subterfuge in semantics to avoid infringement.

The fact still remains that the Teflon-to-glass rotating ball joint will give an air-tight seal without lubricant and without contamination, both in Plaintiffs' claim and in the infringing "Vapsilator," and anyone using or purchasing any of this equipment would know this immediately. The structure of the claim is complete and identical in the "Vapsilator" (R 80-81, 73, 127-128) and the structure is not destroyed by a recommendation for its misuse or less advantageous use.

In *Stearns v. Tinker & Rasor* 252 F(2) 589; 116 USPQ 222 (9th Cir.-1957) this Court held: (p.226)

"The reading of the testimony convinces us that Stearns did not use a wheelless pusher, because one with rollers or wheels provided a better mode of operation. This does not mean that merely because another uses a less effective mode of operation he avoids the charge of infringement."

See also: *Ekco v. Chicago Metallic* 321 F(2) 550; 138 USPQ 547 (7th Cir. 1963) and *Esco v. Hensley* 147 USPQ 15,20 (DC ND Calif.-1965)

The elements of the "Vapsilator" are identical with those of the combination of the claim in suit and this is determinative of infringement.

The uncontroverted evidence is the exact identity of the structural elements of the claim in suit and the structure of the "Vapsilator" (Def Ex A) as well as the operational identity (R 65-80).

As to the second reason ascribed by the trial court (R 510), the double negatives used result in a positive statement, and the proof is clearly that a Teflon-to-glass rotating ball joint is air-tight and self-lubricating (R 89, 342, 215) and that such a joint is necessarily free of lubricant in a rotary evaporator, if the machine is to function properly as intended and the results are to be accurate. The evidence is repleat with statements that there is no necessity for, in fact it is harmful to have lubricant used in the Teflon-to-glass ball and socket joint (R 89, 215, 320, 342, 448). Defendants admit that infringement requires that all of the elements of a combination claim be found in the device charged to infringe (R 129). Infringement is established when such a device is made, used or sold 35 USC § 271 (a). It is true that there is no proof of use (R 116). However, Defendants admit (Plf Ex 12, p 7) they did make and sell this combination of elements as set forth in the claim of the patent in suit, and by the statements of their own brochure (Plf Ex 2) it can be operated with or without a lubricant for the Teflon-to-glass ball and socket joint (R 115). Infringement is not determined by a recommended faulty or im-

proper use. Infringement is the making and/or selling of the infringing structure, the "Vapsilator."

The holding of no infringement is clearly unsupported by the evidence and therefore should be reversed.

Invalidity Has Not Been Established

THE PATENT IN SUIT IS NOT INVALID BECAUSE OF A USE AT THE UNIVERSITY OF CALIFORNIA

The trial court treated invalidity of the patent in suit with the same cavalier approach as was done with respect to infringement. The holding of invalidity should not be treated lightly as it totally involves the destruction of earnest effort, and the sacrifice of time and money as well as the hope of future reward. It is therefore completely astounding that the trial court, without more a-do announced (R 509),

"The Court finds that the use at the University of California of the 49 devices was a prior public use within the meaning of 35 United States Code Section 102(b)."

Such a finding should be the result of a careful analysis of the testimony to ascertain the precise facts and the application of the facts so found to the law.

The entire testimony on this point does not occupy much space in this record. It involves the direct testimony of Dr. Rapoport (R 42-45), and the cross-examination of Dr. Rapoport (R 92-100). It covers a time period beginning not earlier than March 9, 1960 up to August 11, 1960, [which is one year prior to the filing of Plaintiffs application], or some five months time.

There is no question that 49 rotary evaporators were made (R 42) around March 9, 1960, and that these rotary evaporators were precisely the same as those of the patent in suit in all material aspects (R 43). It is equally true that the two original machines were both being tested by Dr. Hamlow (R 40-41, 92) and that Dr. Hamlow's reports to Dr. Rapoport on observations of

the use were very favorable. Why then were these 49 machines built? Both of the patentees had some reservations as to the success of the apparatus because the operation was being carried out by one of the inventors (R 42, 100). Primarily it was Dr. Hamlow's baby, with the result that the treatment could be most gentle. Before reaching any decision as to the general and wide applicability of this apparatus, both Drs. Rapoport and Hamlow felt that it was essential to test these machines experimentally on a wide range of projects (R 42, 100). The best and worst of such tests were to put the apparatus into the hands of graduate students at the University of California (R 43) and require them to make reports on the construction and operation of this equipment in connection with their several and varying projects (R 42-43). Dr. Rapoport felt that this would be an extreme test under laboratory practice (R 43).

The test was conducted in the Department of Chemistry at the University of California and was at all times under the direction and control of Dr. Rapoport (R. 43). The instruments were turned over to his graduate students and passed out to them with the obligation of the students to give a full report on its construction and operation (R 43). At the conclusion of the tests, no date for which was established, Dr. Rapoport felt that the results were so impressive that he and Dr. Hamlow should go ahead and make this equipment available to others doing chemical research (R 44). There was no thought of any commercial use until after the testing of these machines. The apparatus was tested under a wide range of conditions and under all of them it stood up quite well (R 45). The first sale did not occur until November 16, 1960 (R 46), well within the one year statutory period (Patent Office Rule 65, 35 USC § 102(b)).

On cross-examination, it was brought out that Dr. Rapoport had issued instructions to keep the laboratory locked (R 93) and that graduate students, custodians, and faculty members were the

only ones that had access thereto. No others had access (R 93). There was very little opportunity for access because Dr. Rapoport's graduate students occupied a portion of the third floor in the old Chemistry Building, which was an obscure location to begin with, and not on any main corridor (R 93-94).

At the time the instruments were issued, Dr. Hamlow described the instrument and its use in a seminar (R 94) and that an anxiety to acquire these instruments by the graduate students ensued. The instruments were to be employed in the graduate student's elected line of investigation looking forward to a doctors degree in chemistry (R 95). The seminar was a closed seminar (R 97) which only Dr. Rapoport's own graduate students attended and only some twelve persons were involved (R 97).

Each of these pieces of equipment was involved in no other work and was solely for the purpose of securing further experimental tests of this apparatus (R 100).

Elizabeth v. Pavement Co. 97 US 126; 24 L.Ed. 1000 (1877) is the classic case on public use and represents the extent which courts will go to hold validity, when there has been no release of the invention to persons generally and where there is no commercial use or exploitation. The court held: (p 134)

"The use of an invention by the inventor himself, or of any other person under his direction, by way of experiment, and in order to bring the invention to perfection, has never been regarded as such a use."

* * * * *

"When the subject of an invention is a machine, it may be tested and tried in a building, either with or without closed doors. In either case, such use is not a public use, within the meaning of the statute, so long as the inventor is engaged, in good faith, in testing its operation. He may see cause to alter it and improve it, or not. His experiments will reveal the fact whether any and what alterations may be necessary."

This Court has recently reviewed the law under 35 USC § 102(b) and is fully cognizant of and cited with approval the

law which has continuously been applied since *Elizabeth v. Pavement Co.* (97 US 126, 24 L Ed. 1000 (1877)). In *Super Mold v. Clapp's Equipment* F(2); 158 USPQ 527 (9th Cir. 1968), this Court stated: (p.527)

"The statute thus permits the inventor to retain the secrecy of his discovery as long as he does not commercially exploit its use for more than one year prior to his patent application."

In *Cataphote Corp. v. De Soto Chem.* 356 F(2) 24, 25; 148 USPQ 527 (9th Cir.-1966), in *Tool Research v. Honcar* 367 F(2) 449; 151 USPQ 236 (9th Cir.-1966) and in *Super Mold v. Clapps Equip* (supra) this Court held the patent invalid under 35 USC § 102(b). In each instance there was substantial proof of prior public *commercialization* to support the findings. Here there is none. That the use here was in good faith merely experimental is best shown by the testimony of Dr. Rapoport (R 42).

"Q. What was the purpose of making that number of rotary evaporators at this time?

A. We were very impressed with the initial operation of the first and second instrument but we also had some reservation because the operation was being carried out by one of the inventors. Essentially it was his baby and the treatment I think was quite gentle.

"Before reaching a decision as to the general and wide applicability of such an apparatus we felt it should be tried by lesser, let us say, more distant graduate students who would give it possibly the worse experimental tests that one could conceive. We had these made deliberately to put this to the extreme tests, namely, to put it in the hands of students."

And again, on cross-examination (R. 100)

"Q. At the time you placed this order to have forty nine of these evaporators made and most parts for one hundred at that time did you still have doubts that this device would not be satisfactory in operation?

A. I had some doubts. I was beginning to form an opinion but I had some doubts because as you recall the testing in the application had been done by Hamlow and it was his baby. One has to be a little careful in evaluating his optimistic reports so that my impression was that this was good. We still needed further experimental tests.”

No conclusion as to any commercial use of the instrument was made until after the conclusion of this experimental work (R 44). Dr. Rapoport stated

“A. The conclusion was that this was it. We had in our hands undoubtedly the best rotary evaporator that was around. With such an impressive instrument the decision was that we should go ahead and make it available to others doing chemical research as well.”

The facts derived from this testimony—and there is no other, are clearly within the authorized use as set forth in *Elizabeth v. Pavement Co.* (*supra*) where the Court states (p 135)

“He may have it put up and used in the premises of another, and the use may inure to the benefit of the owner of the establishment. Still, if used under the surveillance of the inventor, and for the purpose of enabling him to test the machine, and ascertain whether it will answer the purpose intended, and make such alterations and improvements as experience demonstrates to be necessary, it will still be a mere experimental use, and not a public use, within the meaning of the statute.”

There are no facts to support invalidity under 35 USC § 102(b).

PLAINTIFFS' INVENTION WAS NOT OBVIOUS UNDER 35 USC § 103

The Art Relied Upon Does Not Teach or Disclose Plaintiffs' Invention as a Whole at the Time the Invention Was Made

The defense of obviousness is bottomed on the language of 35 USC § 103 which in part reads as follows:

"A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. * *"

The reliance upon the prior art to show obviousness under § 103 has a necessary corollary i.e. that such art cannot be available for the defenses under § 102 since they are not identical disclosures of Plaintiffs' invention. Also one should not forget the basic consideration that all things become obvious once they have been accomplished.

White v. Converse 20 F(2) 311 (2nd Cir—1927) Judge Learned Hand stated (p. 313)

"* * it is the obvious when discovered and put to use that more often proves invention. * * * * The fact that the changes were so slight is quite irrelevant, so long as they were essential to the purpose, as they were."

The art relied upon by the Defendants consisted of some twenty prior art references none of which Defendants admitted (R. 410, 353, Plf Ex 13 p 5) show the structure or organization of elements called for by the claim in suit. (See also Appendix D). However the trial court relied upon only three references in holding Plaintiffs patent invalid in view of § 103. These three are:

The Bernauer German Gebrauchsmuster (Def Ex R, R-1); Buchler U.S. Patent (Def Ex A-5) and Birchall U.S. Patent (Def Ex A-6).

Only the first two of these are directed to rotary evaporators, and the third is directed to stopcocks.

In order to uniformly apply the provisions of § 103, the Supreme Court in *Graham v. John Deere*, 279 U.S. 56; 148 USPQ 459 (1966) set forth the basic factual inquiries which should be

satisfied in order to determine invalidity or validity. The court stated: (p. 467)

"Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or the nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or nonobviousness, these inquiries may have relevancy."

This Court has consistently followed the determinations laid down by the Supreme Court, see *Evans Products v. Preco Inc.*, 378 F(2) 191; 153 USPQ 835 (9th Cir.—1967) and *Hensley Equipment Co. v. Esco* 375, F(2) 432; 152 USPQ 781, at 782 (9th Cir.—1967), *Zilk v. Deatons* 377 F(2) 545; 153 USPQ 386 (9th Cir.—1967).

The first determination of course is, what is Plaintiffs' invention. This invention is a combination of eleven elements organized and combined to produce new and unexpected results in a rotary evaporator. Some of the elements are new to this art admittedly and some are old.

There can be no denying that the elements old in this art are taught by the prior art. The new elements of the combination are a Teflon rotating shaft (R 455, 28-29, 445) having a tapered male coupling at the lower end, and a Teflon ball portion of a ball and socket joint at its opposite end, with a uniform passage therethrough (R 448). It is also new in this art to provide a glass to Teflon air tight and contamination free coupling at the lower end of this shaft, (R 449, 407) and it is likewise new in this art to provide a Teflon to glass ball and socket rotating joint which is air tight and contamination free (R 451, 353, 410, 445). These

are the principal differences over the prior art cited by the Defendants and it is these differences which Plaintiffs state result in a superior contamination free Rotary Evaporator (R 35, 44).

The factual questions for determination are, are these differences over the prior art references so insignificant that Plaintiffs invention as a whole, would be obvious to a person having ordinary skill in this art at the time the invention was made, April 24, 1958 (R 27). The burden of proof is on Defendants and this burden has not been met.

The Bernauer Gebrauchsmuster

The German Gebrauchsmuster of Dr. Bernauer (Def Ex R, R-1) teaches a rotary evaporator, but it shows and teaches a glass to glass joint of the flask k to the glass shaft g (R 386). This glass to glass joint continues the problems of freezing and breakage which have plagued investigators and researchers in the past (R 111), it therefore teaches nothing new. It provides a Teflon adaptor h which has the ball of a ball and socket joint and a connector socket for the ball joint j, also of Teflon. Thus it is a rotating ball and socket joint with both members h and j made of Teflon (R 341). There is no teaching of an air-tight self lubricating Teflon-to-glass rotating ball and socket joint as called for in Plaintiffs claim. Defendants experts do not agree as to the use of grease or lubricant on the Teflon to Teflon joint. Dr. Cava says none was ever used (R 179), Dr. Dreiding says it was necessary to use lubricant to make the Bernauer equipment operate properly (R 324)

"No we originally did not use any lubrication at all. We thought that this was the reason why we constructed the apparatus, to have it lubrication free. As it turned out however that was as Teflon rotates on Teflon under vacuum conditions there were some pressures put upon it there is a small amount of flaking that occurs. The teflon is flaked off in extremely fine tiny little flakes so that one can hardly

weigh them, they cannot be seen. In order to avoid that some of my co-workers prefer to put a little bit of grease even on the teflon to teflon joint. It turned out that the amount of grease that one needed to make this teflon joint work, turn freely without locking was very, very small."

In this, the Bernauer evaporator did not come up to the expectations which Dr. Dreiding had earlier stated to be as follows:
(R 320)

"The idea was to get a rotating joint that would lubricate itself, would have a very low co-efficient of friction so that you could avoid the use of a lubricant."

The Bernauer teaching is: (Def Ex R-1)

"the ball joint connections of Teflon are essential parts of the apparatus. Only through the use of Teflon * * * was it possible to construct such an efficient and full proof rotational thinlayer evaporator."

Thus the Bernauer Utility Model Registration teaches only a Teflon to Teflon rotating ball and socket joint, and emphasizes that only Teflon can be used. Accordingly, there is not and could not be teaching of the rotary ball and socket joint of Teflon to glass as called for by Plaintiffs claim.

The Bernauer Gebrauchsmuster does not teach or disclose the combination of elements called for by the claim in suit or any teaching which would make Plaintiffs invention obvious even to a skilled person in this art. (See *infra* p. 32)

The Buchler U.S. Patent

The Buchler U.S. Patent No. 2,865,445 (Def Ex A-5) is said to teach each the elements of Plaintiffs claim. A reference to Appendix D at the end of this Brief will show that when the structure of the Buchler Patent is charted against each of the elements of the claim in suit, it does not teach or disclose the elements or combination

required. At the trial Buchler was relied upon to show a Teflon to glass rotating ball and socket joint as called for in elements (f) and (i) of the claim in suit. The portion of the Buchler device relied upon is at the take off end, shown in an enlarged sectional view in Figure 2 of Defendants Ex A-5. It shows a Teflon socket 30 which rotates as a part of the threaded metal portion which is not numbered on the drawing. The glass ball of the ball and socket joint, which is stationary, is 29. It should be observed that here is a showing of a glass to Teflon rotating ball and socket joint in reverse but it still does not fulfill the requirements of Plaintiffs claim in that it does not provide an air tight self lubricating, contamination free engagement as required. The metal portion of this joint contacts the materials being treated and therefore contaminates and destroys the accuracy of the results. There is no teaching in Buchler that he was aware of the problem of contamination (R 454) or that without the metal threaded coupling he could have produced a glass to Teflon rotating joint which was air tight and self lubricating. Furthermore both Dr. Hamlow and Dr. Rapoport knew of the Buchler device and had attempted to use the same in the laboratory of the University of California, and had to give it up because of its most unsatisfactory performance (R 25). There is no teaching and no proof that the Buchler device contained the same elements, in the same organization and produced the same results as the claim in suit. The evidence is completely to the contrary and in fact Buchler could not produce the same results regardless of the elements contained in the Buchler patent. It is not a teaching of Plaintiffs invention and certainly not sufficient to invalidate the Patent.

The Buchler patent was carefully considered by the Board of Appeals in the Patent Office (Plf Ex 4) and the Patent in suit was granted over this reference. It is no more a valid reference now than it was then.

The Birchall U.S. Patent

The Birchall U.S. Patent No. 2,876,985 (Def Ex A-6) is directed to a stopcock for laboratory glassware with a Teflon plug. It therefore does not relate to rotary evaporators and must therefore be considered non-analogous art.

In the first place it should be noted that the Birchall patent did not issue until March 10, 1959, which was some ten months after Plaintiffs had made their invention. Therefore regardless of what it shows it cannot speak as of the date of Plaintiffs invention which was April 24, 1958. (R 27, Plf Ex 5, 5-1). Accordingly, it cannot be relied upon to invalidate the patent in suit under § 103.

In addition it must be pointed out that at best the Birchall patent shows a Teflon stopcock plug 7 which is tapered to fit a female glass taper 6. The entire patent is founded upon the phenomena that the Teflon plug 7 will not be retained in the glass female taper 6 due to its slippery nature, unless retained by some spring or pressure means (R 133-134). In figures 1, 2, and 4 of the patent, the means are a spring 15 and lockcap 16 which is threaded into the narrow projecting end 12 of the plug 7. In Figures 6, 7, and 8, it is a wire spring clip which passes around the glass tubing 5 and up over the top of the plug 7. In Figure 5 there is a compression means bearing against the top surface of the plug to hold it in position while permitting rotation to open and closed positions in each instance.

In Plaintiffs rotary evaporator it was not possible to use such a teaching as is found in Birchall and apply spring or bearing pressure to the taper fit of the glass flask to the male Teflon taper of the rotating shaft. What seemingly was a disadvantage, however, was unexpectedly converted by Plaintiffs into a very distinct advantage. There is a very substantial difference in the coefficient of expansion between glass and Teflon (R 136-139). Teflon expands at a greater rate with heat. When the glass flask is attached to the Teflon shaft Plaintiffs unexpectedly discovered

the benefit from this phenomena because as the glass was heated and the heat transferred to the Teflon shaft joint the glass maintained its air tight, contamination free contact with the Teflon while the Teflon expanded linearly without disturbing this necessary contact. The joint therefore becomes self adjusting (R 88). It also meant that if there was any problem of sticking at this glass to Teflon joint at the end of the evaporation period, the Teflon would contract faster and therefore free the flask for easy and quick removal without any possible sticking or freezing, or danger of breakage either to the flask or to Teflon (R 83-89). Thus in no event does the Birchall patent teach or disclose anything which could be helpful or useful at the time of Plaintiffs invention.

The Ueberwasser U.S. and French Patents

Perhaps it would be well to also point out that at times defendant seemed to rely (R 366) upon the Ueberwasser U.S. Patent No. 3,034,573 (Def Ex 7). This patent was issued May 15, 1962 but was based upon a French patent which issued September 14, 1959 (Def Ex 8) or a year and a half after the date of Plaintiffs invention [April 24, 1958]. Therefore it cannot speak with respect to any teaching obvious at the time Plaintiffs made their invention, as required under § 103.

This patent was relied upon by the Patent Office in rejecting Plaintiffs claim, but the Board of Appeals overruled the Patent Office and allowed the claim in suit over the Ueberwasser reference (Plf Ex 4).

Plaintiffs have made a chart of the principal prior art relied upon by Defendants, charted against the individual elements of the claim in suit. This chart is Appendix D at the end of this Brief. It establishes beyond any doubt that none of the art relied upon teaches or discloses the elements of the claim in suit, and most assuredly does not teach anything with the same organization of elements.

Plaintiffs' Invention Was Not Obvious Even to Persons Skilled in This Art

Section 103 states that the invention must be obvious *at the time of the invention* to a person having *ordinary* skill in the art. All of the investigations relied upon here were by persons having great talents and skills in this art, principally among them Dr. Bernauer, Dr. Cava, and Dr. Dreiding, all of whom hold a doctors degree in chemistry. The key to Plaintiffs invention was under the very nose of these three men. It takes no imagination, now that the invention has been made by Plaintiffs, to point out that if the Bernauer connector socket j had been omitted, and that stationary glass socket [not shown] located above the ball of connection j had been brought down to rest upon and engage the ball of the joint adaptor h, there would have been an air tight contamination free Teflon to glass rotating ball joint. They did not conceive of this. What they now say is obvious was not obvious to them at the time. It hardly becomes them after Plaintiffs have shown the way to a superior machine, to say that it was obvious at the time Plaintiffs made their invention. The truth is that Plaintiffs invention was not obvious even to these skilled investigators.

It is apparent that the trial court by the cavalier treatment given to the question of validity in the opinion at the end of the trial (R 509-510) did not take time to make the factual inquiries necessary to make the legal determination of invalidity, and did not follow the guiding procedures laid down in *Graham v. John Deere* (Supra) and so carefully followed by this Court (See Supra page 26).

Defendants "Vapsilator" Is a Chinese Copy of the Structure and Combination of Elements of the Claim in Suit

One of the greatest compliments which can be paid to the validity and unobviousness of the invention of a patent, derives from the fact that the manufacture of the accused device did not

follow the prior art, but actually reproduced and incorporated all of the structural features set forth in the claim of the patent in suit. The infringing "Vapsilator" is a Chinese Copy of the structure and combination of the claim in suit (R 80, 81).

Both prior to the trial (T 26, 27) in the Answers to Plaintiffs Interrogatories and during the trial, the Defendants were repeatedly asked to point out where in the prior art there was any disclosure which responded to the claim of the patent in suit. In the Request for Admissions, it was stated that there was no patent relied upon, and no prior publication which showed this combination (Plf Ex 13 p. 4). At the trial, Dr. Dreiding, a self-admitted expert in this field (R 385), stated that the closest prior art in his opinion was the Hormuth [Bernauer] evaporator which he and Dr. Bernauer had developed in Switzerland (R 300, 309, 319, 396). The Bernauer [Hormuth] evaporator did not have a Teflon-to-glass rotating ball joint (R 364). It was Teflon-to-Teflon (R 341). Dr Cava said Teflon-to-Teflon was essential (R 264), Dr. Dreiding further testified that he did not want his testimony to include an inference that Teflon is the same as glass (R 425). So did Dr. Cava (R 261). The commercial rotary evaporator "Vapsilator," which Chemophor Zurich began to market in 1965, five years subsequent to the marketing of Plaintiffs product under their invention in November of 1960 (R 46), did not have a Teflon-to-Teflon rotating ball joint (R 408, 364), but had instead a Teflon-to-glass rotating ball joint (R 408), the same as the claim. The "Vapsilator," likewise, did not have a glass rotating shaft, but had a Teflon shaft (R 66) the same as the claim and which was new in this art. Both Teflon-to-glass junctures are the new features of and the structures called for in the claim in suit (R. 89) Neither the contamination free Teflon-to-glass ball and socket rotating joint, nor the Teflon-to-glass lower joint are to be found in the prior art according to Dr. Dreiding's testimony (R 407, 410).

Defendants may deny the actual copying of the structure of the claim in suit, but the fact still speaks vociferously for itself, that the "Vapsilator," the commercial machine which Defendants manufactured and sold, did not follow the prior art upon which Defendants rely, but instead followed the structure of the claim in suit, a successful combination which had not previously existed.

The manufacture of the "Vapsilator," did not follow the teachings of Dr. Bernauer, Dr. Dreiding or the German Utility Model, but instead, duplicated the structure, combination, and the teachings of Plaintiffs patent in suit (R 407-8, 410). This is the testimony of an interested party, Dr. Dreiding, who seeks to capture the United States market in rotary evaporators for his own Swiss company, by destroying a United States patent, and who, by his own admission, is an expert in this field. The obvious was not obvious to any one skilled in this art, even Defendants skilled, but biased witness, Dr. Dreiding.

If the alleged prior art was good enough to destroy Plaintiffs' patent, then why was it not good enough for Dr. Dreiding to follow in producing the "Vapsilator"!

The Presumption of the Validity of Plaintiffs' Patent Is Unrebutted

The presumption of validity of Plaintiffs patent as issued by the Patent Office could only be overcome by clear and convincing proof. *Neff Instrument v. Cobu*, 298 F(2) 82; 132 USPQ 98 (9th Cir. 1961), see also *Hayes Spray Gun v. E. C. Brown Co.*, 291 F.2d 319, 322; 129 USPQ 383, 386 (9th Cir. 1961).

The presumption of validity is strengthened by the history of the patent in the Patent Office where the patent was granted only after considerable controversy and where the Patent Office considered the most pertinent references before issuing the patent.

National Sponge Cushion v. Rubber Corp., 286 F (2) 731; 128 USPQ 320 (9th Cir. 1961).

Neff Instrument v. Cobu, 298 F(2) 82; 132 USPQ 98 (9th Cir. 1961).

The patent in suit was not issued without a struggle (Plf Ex 4). No claims were allowed by the Examiner during the prosecution, and an appeal was taken to the Board of Appeals from the final rejection of all claims. The Patent Office considered the Buchler patent (Def Ex A-5), the Ueberwasser patent (Def Ex A-7) and numerous others but particularly the Buchler and Ueberwasser patents. One claim, the claim of the issue patent in suit, was allowed as a result of this appeal. Thus the pertinent art was before the Patent Office and the claim of the patent in suit was issued only after an appeal.

It is true that the Bernauer Gebrauchsmuster was not a reference. However, the presumption of validity attached to the claim is not impaired because the Gebrauchsmuster was not considered by the Patent Office as a prior patent during the time Plaintiffs application was in the Patent Office. A Gebrauchsmuster is best defined in Def Ex Y:

"The German law, in addition to the regular patent law, provides for short term exclusive rights in new articles of manufacturer (processes and composition of matter being excluded) which might be of a lower order of inventive merit that is required for the longest term patent. These go by the name of 'Gebrauchsmuster' which word is customarily translated as 'utility model' and might also be translated as 'useful article.' They are issued without search and the specifications and drawings, while available to the public, are not issued in printed form."

Even in Germany they do not constitute a reference against or have any effect with respect to a corresponding German patent application directed to the same subject matter, XVII JPOS 376.* Thus in Germany they are not recognized as an anticipation for German patents. Inasmuch as the full specifications and drawings are not issued in printed form, they cannot be used as printed

*Journal of the Patent Office Society.

publications anywhere. The only thing which is published is a notice of the registration. The notice of the Bernauer registration is reproduced at the bottom of page 2 in Defendants Exhibit R. The Patent Office practice since *Ex parte Smith* 82 USPQ 83, did not permit the use of a Gebrauchsmuster as a prior patent in the prosecution of a U.S. application. In *Ex parte Smith* 82 USPQ 83 (P.O. Bd App—1941) the issue was squarely, are Gebrauchsmusters patents. The Board held; (p. 83)

"It is our view that Sections 4883-4886 should be construed together and that the protection afforded by Gebrauchsmusters is not patent protection within the meaning of our laws."

In the Permutit Co. v. Graver Corp. 437 (2) 898; 7 USPQ 51 (7th Cir—1930) the Court held, (p 56)

"The weight of authority seems to exclude the use of the entire Gebrauchsmuster as anticipation. But the courts are divided in the question." [citing cases]. "We have eliminated the two Gebrauchsmusters from our consideration of the case".

In American Infra-Red v. Lambert 360 F(2) 977; 149 USPQ 722 (8th Cir—1966) the court stated: (p 732)

"There are no judicial cases indicating how a Gebrauchsmuster should be treated under the provisions of § 102(d), and only scant authority as to how Gebrauchsmusters are to be treated under other provisions of our patent law."

This court, however, held at page 734, that a Gebrauchsmuster was a patent within the meaning of the patent law, and therefore, a statutory bar to the validity under 35 USC § 102(d) if directed to precisely the same combination of elements.

It was not until September 27, 1965 that the Patent Office changed the rule and amended § 901.05(b) MPEP* to permit

**Manual of Patent Examining Procedure*, U.S. Dept. of Commerce. Patent Office 3rd Ed. (1961).

German registrations of Utility Models [Gebrauchsmusters] to be used as prior patents, but not as printed publications (Def Ex Y). The change in the rules occurred after the prosecution of the patent in suit, after the decision on Appeal, and after the Notice of Allowance (Def Ex K). Therefore at no time during the prosecution of the application resulting in the patent in suit was this Gebrauchsmuster a proper reference against Plaintiffs application. Since the propriety of a reference being called to the Patent Office's attention is determined as of the date of the prosecution, the failure of the examiner to refer to this Gebrauchsmuster registration in no way militates against the presumptive validity of Plaintiffs patent. At no time during the prosecution of the claim in suit was the Bernauer Gebrauchsmuster (Utility Model) a proper reference since it could not be used as a prior patent.

The Patent Office did, therefore, consider the most pertinent art, and the *prima facie* validity of the claim in suit is not overcome.

Commercial Success by Plaintiff Is Not Questioned

Since Plaintiffs equipment made in accordance with the patent in suit was brought on the market its success has been phenomenal. The success was indiluted because Plaintiffs did not operate through salesmen or distributorships but relied solely on very simple and sparse advertising to acquaint chemists of the new equipment, the acceptance of this equipment by the industry has been immediate and continuous. The story of commercial success in the record commencing with the first sale November 16, 1960 (R 46) is told in the testimony of Dr. Rapoport (R 47-52). Such commercial success is a circumstance favorable to nonobviousness. There was no evidence to the contrary.

Plaintiffs' Invention Filled an Urgent Need

As a further indicia of nonobviousness Plaintiffs invention was born out of a need. The need and the activity of Dr. Hamlow and

Dr. Rapoport gave rise to this invention (R 25). These needs came out of the failure of other equipment to do the job and to do it properly.

All of the secondary considerations showing nonobviousness are present in connection with Plaintiffs invention, all of them are uncontested by Defendants and all of them are in supplement to the basic factual determinations showing nonobviousness under § 103.

CONCLUSION

It was Plaintiffs who took the final step to make a rotary evaporator, air tight and contamination free and which turned prior failures into success. As was stated in *The Barbed Wire Patent* case, 143 U.S. 275 (1892).

"Under such circumstances courts have not been reluctant to sustain a patent to the man who has taken the final step which has turned a failure into a success. In the law of patents it is the last step that wins."

As is shown conclusively by the testimony, infringement by Defendants "Vapsilator" is tacitly admitted, and thoroughly proven. As to invalidity no effort was made by the trial court or Defendants counsel to follow the requirements for determining invalidity under § 103. When these requirements are examined and tested it is clear that there is no support for the holding of invalidity of the patent in suit under § 103.

As indicated earlier Plaintiffs have already received judgment under 35 USC §§ 101 and 116. The defense of prior public use at the University of California under § 102(b) fails because the burden of proof is on the Defendants to show that the kind of use was sufficient to cause invalidity. Factually and under the decisions, this use was not proved. Therefore, there is no possible basis for the holdings of either noninfringement or invalidity of the patent in suit and the judgment of the trial court must be reversed.

Respectfully submitted,

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1811 Mills Tower
San Francisco, California 94104
415/362-3361

*Attorney for
Plaintiffs-Appellants*





Appendix A

PLAINTIFFS-APPELLANTS' EXHIBITS

Exhibit	Identified	In Evidence	Description
1		17	Patent 3,219,099 in suit entitled "Rotary Evaporator and Separator" issued November 23, 1965.
2		61	Rinco brochure for "Vapsilator Model M-70" showing imprint of Scientific Glass Apparatus Co., Inc.
3		58	Scientific Glass Apparatus Co., Inc. advertisement, p. 335, September 1966 issue of "The Vortex."
4		57	Opinion of the Board of Appeals in the Patent Office dated November 25, 1964.
5		26	Shop Order dated April 24, 1958 job No. 412— [First four pages]
5-1		32	Shop Order dated May 6, 1958, job number 416.
5-2		90	Original equipment made May 6, 1958.
6	41	52	Drawing dated May 20, 1960.
7	45	52	Documents showing first sale of Plaintiffs equipment, (a) Stanford University Purchase Order No. US 79605 dated November 16, 1960; (b) Chemquip Co., Invoice No. 100 dated December 9, 1960 and (c) Stanford University check stub dated December 13, 1960.
8	49	52	Chemquip Co. Rotary Evaporator catalog leaflet No. 1.
9	50	52	Calab Model C Evaporator catalog sheet No. 2.
10	51	52	Chemquip Rotary Evaporator Model 100, catalog leaflet No. 3.
11		57	Instruction packing sheet for rotary evaporator dated March 25, 1961.
12		64	Defendants' Responses to Plaintiffs' Requests for Admissions.
13		64	Defendants' Answers to Plaintiffs' Interrogatories.
14		157	Defendant Francis J. Rinderer Answers to Plaintiffs' Interrogatories.
15		157	Defendant Scientific Glass Apparatus Corp. Answers to Plaintiffs' Interrogatories.
16		81	Agreement dated September 21, 1965, between Chemophor Zurich and Rinco Instrument Co., Inc.
17		59	Letter dated August 30, 1966.
18		60	Letter dated September 2, 1966 from Scientific Glass Apparatus Co., Inc. to Dr. Rapoport.
19		62	Notice of Infringement to Scientific Glass Apparatus Co., Inc. dated September 26, 1966 with registered mail receipt attached.

Exhibit	Identified	In Evidence	Description
20		63	Letter dated September 29, 1966 from Scientific Glass Apparatus Co., Inc. to Dr. Rapoport.
21		114	Blow-up enlargement of center page spread of Exhibit 2.
22		114	Blow-up enlargement of the drawing of the patent in suit.

DEFENDANTS-APPELLEES EXHIBITS

A-1		157	Barotte U.S. Patent No. 440,752, issued 1890.
A-2		157	Brown et al, U.S. Patent No. 2,536,676 issued 1951.
A-3		157	Smith U.S. Patent No. 2,575,688 issued 1951.
A-4		157	Rinderer U.S. Patent No. 2,797,747 issued 1957.
A-5		157	Buchler U.S. Patent No. 2,865,445 issued 1958.
A-6		157	Birchall, Jr. et al, U.S. Patent No. 2,876,895, issued 1959.
A-7		157	Ueberwasser et al, U.S. Patent No. 3,034,573, issued 1962.
A-8		157	French Patent No. 1,208,225 issued 1959.
B		357	S. Ricklin, "Filled Teflon for Dry Bearings", Materials and Methods, October 1954, page 112 to 114.
C			Fieser and Fieser "Organic Chemistry," D.C. Heath & Co. (1950) page 957.
D		348	L. C. Craig et al "Versatile Laboratory Concentration Device," Analytical Chemistry, Vol. 22, No. 11, pg. 1462, November 1950.
E		355	M.E. Volk "All-Glass Rotary Film Evaporator" Analytical Chemistry, Vol. 27, No. 7, page 1207, July 1955.
F		[NIE]*	R. Brooks et al "Rotary film evaporator for laboratory use," Journal of Scientific Instrument, Vol. 28, page 28 (1951).
G		[NIE]*	W. Kirsten "Absorption Train for Determination of Carbon and Hydrogen," Mikrochem Acta 1953/1-2, pages 41-43.
H		357	Von Metzsch, Chem-Ing.-Technik, Vol. 28, No. 1 (1956) page 62.
H-1		357	English Translation.
I		[NIE]*	P. G. Howe "Greaseless Vacuum Rotor Seal" Laboratory and Shop Notes (1955) p. 625.
J		(excluded)	
K		158	Certified copy of file wrapper and contents of patent in suit No. 3,219,099.

*Not in evidence, but relied upon in the Pre-Trial Order (T 32-33).

Exhibit	Identified	In Evidence	Description
L		[NIE]*	Sketch attached as Exhibit A to Defendants' Request for Admission Nos. 26, 27 and 28.
M		158	Plaintiffs' Responses to Defendants' Interrogatories Nos. 1-25.
N		158	Plaintiffs' Answers to Defendants' Requests for Admissions Nos. 1-10.
O		159	Plaintiffs' Answers to Defendants' Requests for Admissions Nos. 11-28.
P		307	German Laboratory Text <i>Method of Organic Chemistry</i> .
P-1		307	English Translation.
Q		314	Bernauer Brochure.
Q-1		315	English Translation of Exhibit Q.
R		160	Certified copy of German Gebrauchsmuster 1,752,622.
R-1		160	English Translation.
S		359	Advertisement of Fischer & Porter <i>Analytical Chemistry</i> December 1956.
T		359	Fischer & Porter Stopsock— <i>Analytical Chemistry</i> p. 66A Dec. 1956.
U		[NIE]**	Fischer & Porter, Adv. <i>Analytical Chemistry</i> March 1957.
V		[NIE]**	Page 149—Vol. 36, <i>Jour. of Chem. Ed.</i> March 1959.
W		[NIE]**	<i>The Journal of Teflon</i> Vol. 1, No. 5, May 1960, pp. 1-8.
X		[NIE]**	Mechanical Engineering, pp. 883-884 Nov. 1953.
Y		160	Copies of pages 1 and 2 from the <i>Official Gazette</i> , United States Patent Office Volume 820 #1, dated Nov. 2, 1965.
Z			Deposition of Dr. Michael P. Cava.
Z-1		219	Xerox copy of Bernauer Brochure.
Z-2		219	English Translation.
Z-3		219	Drawing of German Gebrauchsmuster.
Z-4		219	English Translation of German Gebrauchsmuster.
Z-5		219	Print of drawing and parts list.
Z-6		219	Pencil Sketch.
Z-7		219	Print, same as Z-5 but clearer copy.
AA		342	Commercial Model of the "Vapsilator" charged to infringe.

*Not in evidence, but relied upon in the Pre-Trial Order (T 32-33).

**Noticed by Defendants 30 days before trial (T 37).

Appendix

Exhibit	Identified	In Evidence	Description
AB		161	Certified copy from records of U.S. Patent Office listing the Gebrauchsmuster issued including No. 1,752,622.
AC		333	Prototype machine with one part missing.
AD		333	Prototype machine with one part missing.
AE		333	Prototype machine with one part missing.

OPINION BY TRIAL COURT (R 509-511)

THE COURT: One of the problems that has bothered me R 509
from the beginning of the testimony of Dr. Rapoport was the
question of prior public use in the United States.

The court finds that the use at the University of California
of the 49 devices was a prior public use within the meaning
of 35 United States Code Section 102 (b).

The court further finds that the patent is invalid because of the R 510
teaching of the prior art, particularly the Bernauer patent, because
of the teachings that are set forth in Birchall and Buchler as
showing connections of teflon against glass to accomplish a con-
tamination free, frictionless connection.

Judgment will be for the defendants.

Would you prepare the findings of fact and conclusions of
law for the judgment?

MR. MOORE: Is there any ruling on the question of infringe-
ment if in the event there was a reversal of the judgment—

THE COURT: The court will further find that there is no
infringement of the use of the combination of substances set
forth in the Hamlow-Rapoport patent because of the apparent
required use of the lubricant at the connection in the ball and
socket as recommended and because of the lack of evidence of
the lack of necessity of such a lubricant at those points.

MR. MOORE: Your Honor, about the point of low vacuum
source. That was another contention that we stated, avoided
infringement because the claim calls for and there is no proof.

THE COURT: I think that it is fairly implicit in the advertis-
ing that the court could draw an inference that there is a
low vacuum source.

MR. MOORE: There is no question that the device if used R 511
is to be so used but there is no proof that it has been so used.
That is my point.

THE COURT: I do not think I am ready to so find in that respect.

Thank you, gentlemen.

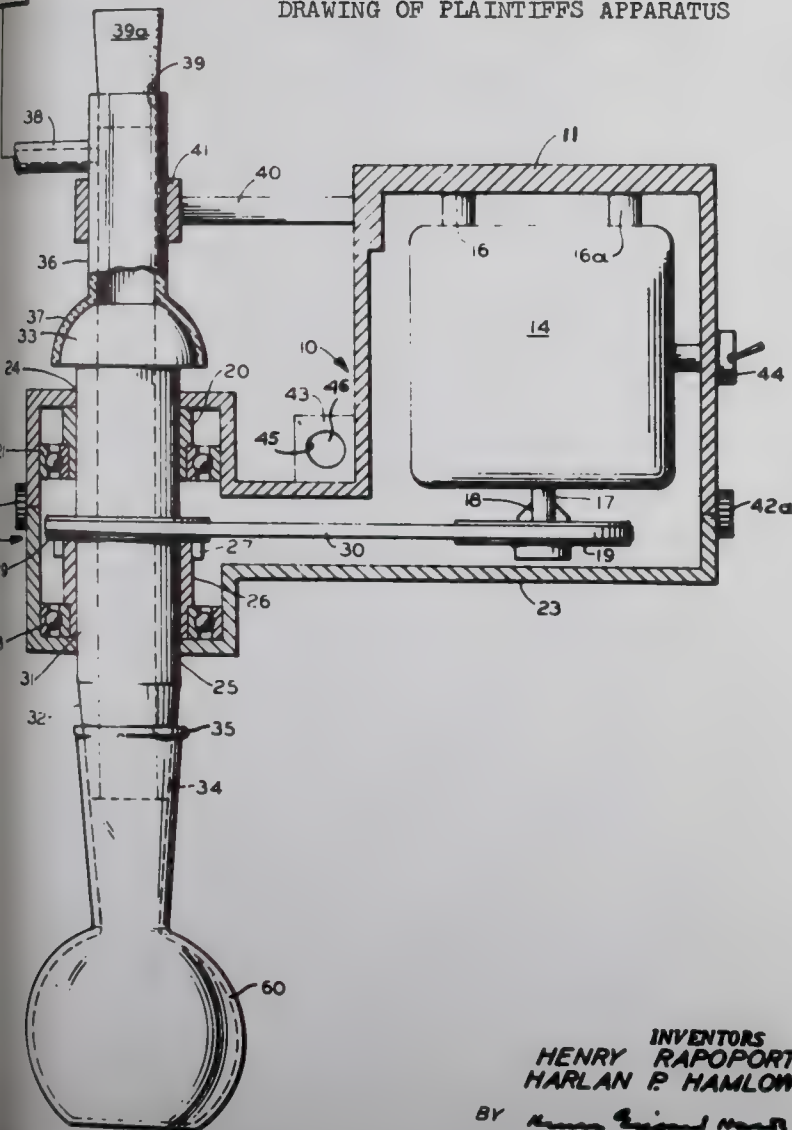
MR. HARDY: Thank you, your Honor.

MR. MOORE: Thank you.

MR. KRIEDEL: Thank you, your Honor.

APPENDIX C

DRAWING OF PLAINTIFFS APPARATUS



INVENTORS
HENRY RAPOPORT
HARLAN P. HAMLOW
BY *Henry Rapoport*

Supporting metal frame

Connector socket ball joint of Teflon

Joint adaptor tapered cone and spherical ball joint of Teflon

Connecting piece of glass

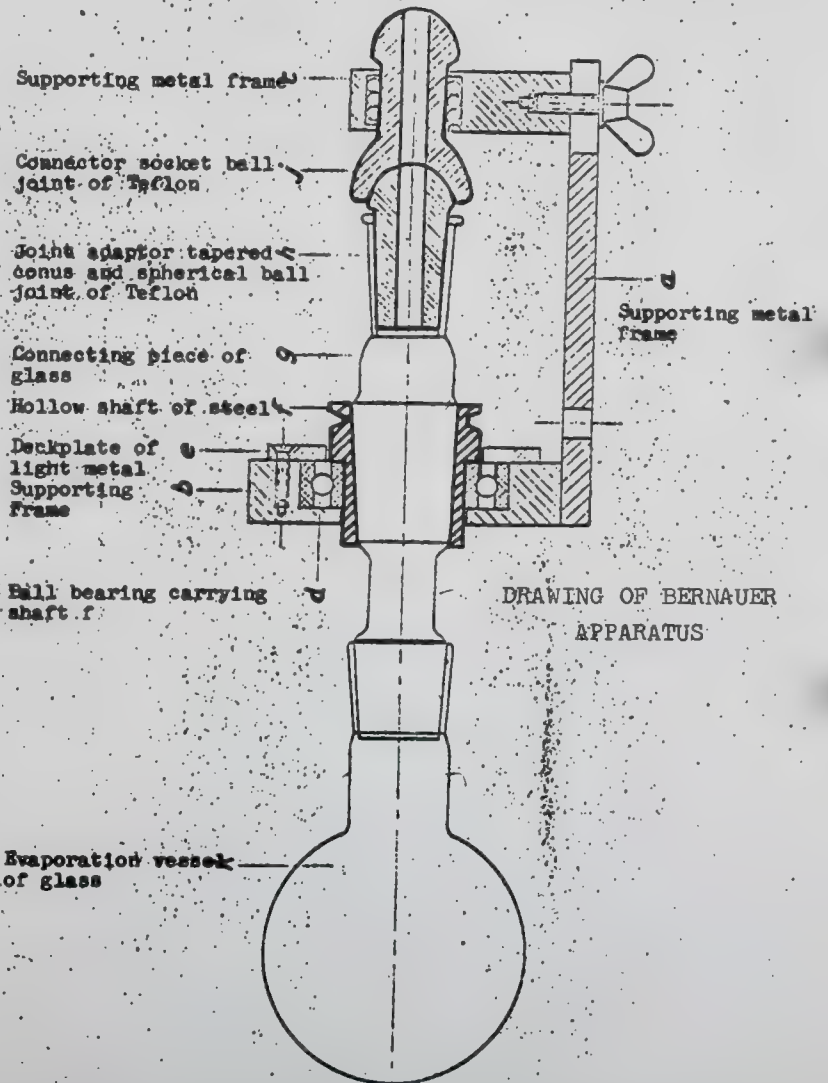
Hollow shaft of steel

Deckplate of light metal
Supporting frame

Ball bearing carrying shaft f

Evaporation vessel of glass

zum Kühler, zur Vakuumleitung



DRAWING OF BERNAUER APPARATUS

Rotations - Dünnschichteneindampfer nach Dr. K. Bernauer
zur Gebrauchsmusteranmeldung vom 17.7.57
der Firma L. Hormuth, Jnh. W. E. Vetter, Wiesloch / Baden

THE COURT: I do not think I am ready to so find in that respect.

Thank you, gentlemen.

MR. HARDY: Thank you, your Honor.

MR. MOORE: Thank you.

MR. KRIEDEL: Thank you, your Honor.

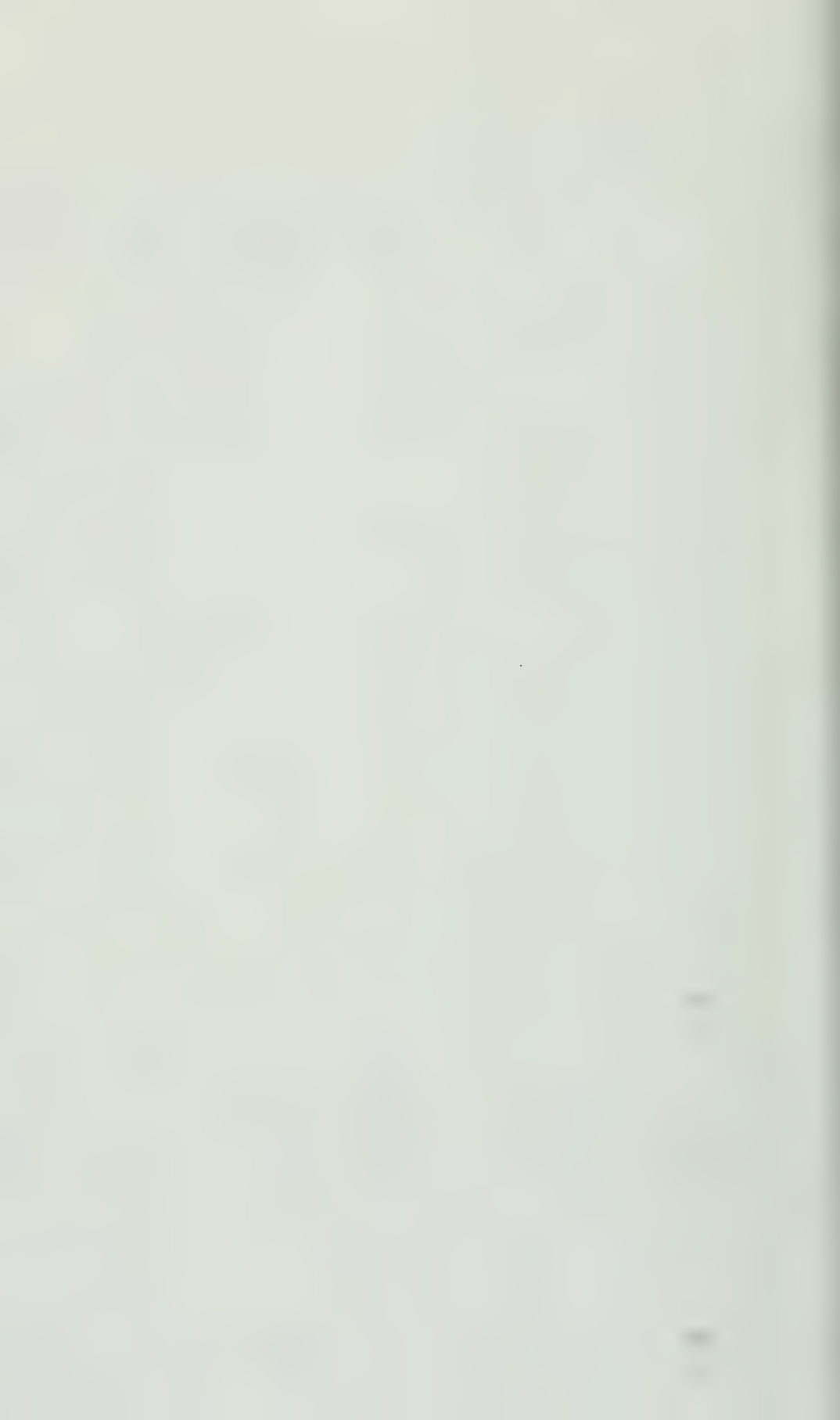
Appendix D

CLAIM OF THE PATENT IN SUIT

PRIOR ART RELIED UPON BY DEFENDANTS

	Barotte 440,752 (R 157)	Brown 2,536,676 (R 157)	Smith 2,575,688 (R 157)	Rinderer 2,797,747 (R 157)	Buchler 2,865,445 (R 157)	Birchall 2,876,985 (R 157)	Ueberwasser 3,034,573 (R 157, 365)	Ciba-French 1,208,225 (R 157)	Craig and Hausmann (R 349)	M. E. Volk (R 355)	Partridge F	Mikrochemica G	von Metzsch (R 356)	H	Sketch L	Bernauer Brochure (R 314)	Bernauer Gebrauchs- muster (R 159, 301, 364)	Myer and Reed Modification Z-7
	A-1	A-2	A-3	A-4	A-5	A-6	A-7	A-8	D	E	F	G	H			Q	R	
Apparatus for separating and removing volatile substances from a composition, in combination																		
(a) A housing	X*	X	X	X	X	NO	X	X	X		X	NO				X	X	X
(b) A shaft made of polyfluorovinyl resin.....	NO	NO	NO. metal	NO. metal	NO	plug	glass	glass	NO		NO stainl. steel	NO			X NO glass Teflon		glass	glass
(c) rotatably mounted in said housing and with both of its ends extending beyond the limits of said housing....	NO	NO	X	X not so mounted	NO	X	X	X	NO		X	NO			X			X
(d) said shaft having a passage of substantially uniform diameter extending axially through the entire length thereof	NO	NO	NO	X not all the way	NO	NO	NO	NO	NO		X	NO			X		NO	NO
(e) said shaft having one end thereof removably securing a flask in airtight engagement for rotation therewith....	NO	NO	X	X	NO	NO	X	X	NO		X	NO			X glass to glass		X glass to glass	X glass to glass
(f) said shaft having its opposite end formed as the ball portion of a ball and socket joint.....	NO	NO	NO	NO	NO	NO	NO	NO	NO		NO	NO			X Teflon Adapt.		No. Teflon adapter	NO. Teflon adapter
(g) A separately mounted glass fixed member, [non-rotating]	NO	NO	X	—	yes	yes	X	X	yes		X	NO			X	X	X	X
(h) having an axial passage therethrough of substantially the same diameter....	NO	NO	NO	—	NO	yes—but not w. plug	NO	NO	NO		NO	NO					NO	NO
(i) terminating with the socket portion of the ball and socket joint rotatably receiving and seating the said ball portion of said shaft in airtight self-lubricating engagement and with their respective passages in alignment	NO	NO	NO	—	NO base portion	NO	NO	NO	E-glass to glass ball joint		NO	NO			X glass to Teflon		NO	X glass to Teflon
(j) Exhaust means communicating with the passage in said fixed member connected to a source of low pressure, and.....	NO but not so connected	NO but not so connected		X	X	—	X	X	X		X	NO			X	X	X	X
(k) Drive means mounted in said housing for rotating said shaft.....	X but no shaft	X solid shaft	X	X	X	NO	X	X	X		X	NO				X	X	X

* X means that the element of the claim is present in some form.



IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUL 1 1968

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

THE DEUTSCH COMPANY,
ELECTRONIC COMPONENTS DIVISION,
Respondent

ON PETITION FOR ENFORCEMENT AND ON PETITION
TO REVIEW AND SET ASIDE AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

PAUL J. SPIELBERG,
Attorney,
National Labor Relations Board.

FILED

JUN 29 1968

WM. B. LUCK, CLERK

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STATUTE:

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 22,753 and 22,811

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

THE DEUTSCH COMPANY,
ELECTRONIC COMPONENTS DIVISION,
Respondent

ON PETITION FOR ENFORCEMENT AND ON PETITION
TO REVIEW AND SET ASIDE AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*),¹ for enforcement of its order (R. 64-65, 19-35)² issued on May 31, 1967, against the Company. The Com-

¹The pertinent statutory provisions are reprinted in Appendix A, *infra*, p. 18.

²References to the pleadings, decision and order of the Board, the Trial Examiner's recommended decision and order, and other papers reproduced as

pany has also filed a petition to review and set aside the Board's order. The Board's Decision and Order are reported at 165 NLRB No. 5. This Court has jurisdiction of the proceedings, the unfair labor practices having occurred in Banning, California, where the Company is engaged in the production and sale of miniature electrical connectors used in the aerospace industry. No question of jurisdiction is presented.

STATEMENT OF THE CASE

I. THE BOARD'S FINDING OF FACT

Briefly, the Board found that the Company violated Section 8(a)(1) of the Act by maintaining and enforcing an unlawful no-solicitation and no-distribution rule, and by improperly assisting its employees to withdraw their support from the Union.³ The Board also found that the Company violated Section 8(a)(3) by imposing disciplinary suspensions on two employees who breached its invalid no-solicitation and no-distribution rule. The facts on which these findings rest are summarized below.

A. Background

The Company has instituted certain security measures designed to safeguard valuable metals used in production and to qualify the Company for classified work (R. 22; Tr. 17-19, 185-186). Thus, a

Volume I, pleadings, are designated "R". References to portions of the stenographic transcript reproduced pursuant to the rules of this Court are designated "Tr." "G.C. Exh." refers to the General Counsel's Exhibits, "R. Co. Exh." refers to respondent Company's Exhibits, and "Jt. Exh." refers to those exhibits introduced jointly by the parties. References preceding a semicolon are to the Board's findings; those following are to supporting evidence.

³United Steelworkers of America, AFL-CIO.

“security area,” enclosed with steel fencing topped with barbed wire, surrounds all the production facilities of the plant. Most employees enter the plant through the east gate which is between the Company’s private parking lot and the “security area.” Some employees use the north gate which affords entrance to the “security area” from a public street (R. 20; Tr. 67-69, 178-182). Identification badges are required for admittance to the plant and guards check lunch boxes, brief cases and packages carried by persons leaving the plant (R. 22; Tr. 187-192).

The Company was initially granted a security clearance by the Department of Defense on February 27, 1961. This clearance was administratively terminated on June 27, 1966, but was reissued on October 26, 1966. However, during the relevant period of May, June and July of 1966, no work of a classified nature was being performed by the Company (Tr. 12-14, 22-23).

In 1962 the Company began distributing to new employees a booklet entitled “Welcome” which set forth the Company’s history and policies, including the following rule about solicitation (R. 21; Jt. Exh. 2):

COLLECTIONS AND GIFTS:

The solicitation of funds for any purpose, the sale of tickets for all purposes, the operation of lotteries and raffles, and the solicitation of membership in organizations during working hours on Company property are absolutely prohibited.

B. Interference, restraint and coercion

1. *June 1 and 2—threats of discharge*

On June 1, 1966,⁴ Company employees began distributing authorization cards on behalf of the Union. On that day, employees Charles Callihan, Mark Grim and Daniel Salcido distributed authorization cards to employees both outside and inside the north gate prior to the commencement of work (R. 23; Tr. 66-69, 109-110). Shortly thereafter, the men decided to split up and Salcido headed for another gate. While crossing a field on Company property he handed an authorization card to a fellow employee. The guard yelled at him, "Hey, don't do that. You'll get fired for doing that" (R. 25; Tr. 110). Salcido then attempted to pass out cards *outside* the east gate, but the guard directed him to move further down the road (R. 25; Tr. 110-111). On June 2, before work began, Callihan alone was distributing cards outside the east gate when a guard said to him that he "could get in trouble doing that" (R. 23; Tr. 69-71).

2. *June 3—Interrogation and warnings of discharge*

On June 3, before work began, Callihan and Grim distributed cards inside the east gate. Jan Winterbourne, assistant personnel manager and security officer approached, told the men they could get into trouble for this activity and suggested that they pass out the cards on the other side of the gate. When Callihan said that they would remain where they were, Winterbourne handed him the following warning notice (R. 23; Tr. 71-73, 199-202, G.C. Exh. 3):

⁴All dates hereafter refer to 1966.

It is forbidden to hand out Union literature within the Deutsch plant during working hours or rest periods. This decision is based upon the National Labor Relations Board Rules and Regulations. Continued infraction will lead to dismissal.

Winterbourne attempted to hand a copy to Grim but Grim refused to accept it (R. 23; Tr. 201).⁵

That same morning, before work commenced, employees Salcido, Pacheco and Carrillo distributed cards *outside* the north gate. George Stanley, the Company's personnel manager, approached them, asked if they knew what they were doing, and gave each of them a warning notice which read as follows (R. 25; Tr. 111-113, 130-133, 146-149, G.C. Exh. 4):

It is forbidden to distribute Union literature within the Deutsch plant. This decision is supported by the Rules and Regulations of the National Labor Relations Board.

The solicitation of membership in organizations during working hours is expressly prohibited on page 15 of the Deutsch Indoctrination Manual given to employees when they are hired. Continued infraction will lead to dismissal.

Stanley then warned them not to bring the union cards inside the plant; the men placed the cards in Pacheco's truck before clocking in (R. 29; Tr. 113, 133, 149-150).⁶

Soon after Callihan received the warning notice from Winterbourne, he was called into an office and introduced to personnel

⁵ A similar notice had been posted on the plant bulletin board (R. 28; Tr. 83-84, 117-118).

⁶ The warning notices to Carrillo and Pacheco were subsequently withdrawn (R. 25; Tr. 126-127, 138-140, 162-164).

manager Stanley. Stanley told Callihan that it was “against the Company policy to go to work and hand out any literature or any solicitation of any kind and distribution of any kind on Deutsch property” (R. 26; Tr. 219-220). Stanley then handed Callihan a warning notice similar to the ones given to Salcido, Carrillo and Pacheco. Callihan showed Stanley the notice he had been given earlier and refused to sign the second warning notice when asked to do so by Stanley. Stanley then asked Callihan what his intentions were and Callihan said that he “would keep passing out cards until I run out of cards or get fired.” Stanley finally responded, “Well, if you’re here doing this Monday morning, you won’t be around no more” (R. 26; Tr. 76-77).

That morning Salcido, too, was called into an office for an interview with Stanley. After retrieving the warning notice he had given Salcido earlier in the day, Stanley asked Salcido whether that was the first day he had passed out union literature. Salcido said no. Stanley asked, “Was it yesterday?” Salcido again said no, that he had passed out Union literature on June 1. Salcido then refused to sign a warning slip, and told Stanley that he had not passed out Union literature inside the gate. Stanley pointed to the union button Salcido was wearing and said “you tell the people that gave you that button that we’re not fooling. We don’t care about the National Labor Relations Board. If you’re out there Monday morning we’re going to fire you. It’ll take at least three months before we get into court, and what will you be doing during that time? You think it over” (R. 27; Tr. 113-115).

3. *July 8—disciplinary layoffs*

On Friday, July 8, Callihan and Salcido handed out authorization cards in the Company lunchroom during their respective lunch periods (R. 29; Tr. 79-80, 119-120). Shortly after lunch, Callihan and Salcido were separately summoned to the personnel office where Ken Moyer, the new personnel manager, gave them disciplinary layoffs until the following Wednesday for distributing cards in the lunchroom (R. 29; Tr. 80-83, 120-121, 205-208, 225-226, 250-252).

4. *July 14—the Company assists employees to withdraw Union support*

On July 14 the Company sent a letter to its employees accusing the Union of “bamboozl[ing]” employees into soliciting on its behalf, and also accusing these solicitors of “forc[ing] Union authorization cards upon the employees in the lunchrooms.” (R. 29-30; Tr. 61-63, G.C. Exh. 2). Accompanying the letter was a stamped postcard addressed to the National Labor Relations Board which advised the Board that the signer had executed a Steelworkers authorization card “because of misinformation or duress” and concluded: “I hereby revoke my authorization for all purposes.” (R. 29; G.C. Exh. 2a). The letter also said (R. 30; G.C. Exh. 2):

If you have changed your mind, been misinformed, coerced, threatened, intimidated into signing an authorization card OR if you think someone may have sent in a card with your name on it, you can revoke that card by mailing the enclosed postcard.

II. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board found that the Company maintained and enforced unlawfully broad limitations on solicitation and on distribution of union literature by posting rules prohibiting such activities in non-work areas and on non-work time; by issuing warning notices to employees who disobeyed these rules; and by threatening such employees with discipline or discharge—all in violation of Section 8(a)(1) of the Act. The Board also found that the Company violated Section 8(a)(1) by unlawfully assisting employees to revoke their union authorization cards. Finally, the Board found that the Company violated Section 8(a)(3) by laying off employees Salcido and Callihan because they engaged in protected activity which was prohibited by the Company's unlawful rules (R. 13-14).

The Board's order directs the Company to cease and desist from the unfair labor practices found, and from in any like or related manner interfering with, restraining or coercing its employees in the exercise of their Section 7 rights. Affirmatively, the Company is required to make Salcido and Callihan whole for any loss of earnings they may have suffered as a result of the unfair labor practices, to withdraw from personnel files of employees warning notices or other disciplinary notations attributable to the Company's unlawful rules, and to post the appropriate notices (R. 14-15).

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) AND (3) BY MAINTAINING AND ENFORCING AN UNLAWFUL NO-SOLICITATION AND NO-DISTRIBUTION RULE

There is no dispute that as soon as the Union's organizing campaign began, the Company invoked a rule forbidding employees to solicit for the Union or to distribute campaign material anywhere on the plant premises during rest periods, lunch breaks, prior to work or at any other time. Nor is it disputed that the Company enforced these restrictions by threatening employees with discipline or discharge for disobeying them; by issuing warning notices to employees for distributing union literature just inside the plant gates before the start of work; by interrogating employees about whether they had or would violate the restrictions; and by imposing disciplinary lay-offs on two employees who distributed union cards in the plant lunch room during their respective lunch breaks. If, as we show, the Company's rule imposed unjustifiable restraints upon its employees' organizational activities, the Board properly found that its threats and warnings violated Section 8(a)(1) and that its suspension of Callihan and Salcido for passing out cards in the lunchroom violated Section 8(a)(3) of the Act.⁷

It is well established that an employer's prohibition of solicitation or distribution of literature on behalf of a union during non-working time in nonwork plant areas is presumptively invalid. The Board's policy on this subject was approved by the Supreme Court

⁷E.g., *N.L.R.B. v. Miller-Charles & Co.*, 341 F.2d 870, 874 (C.A. 2); *N.L.R.B. v. Southwire Co.*, 352 F.2d 346, 348 (C.A. 5); *N.L.R.B. v. Willow Maintenance Corp.*, 332 F.2d 367, 368 (C.A. 2).

in *Republic Aviation Corp. v. N.L.R.B.*, 344 U.S. 793, 803, n. 10, quoting from *Peyton Packing Co.*, 49 NLRB 828, 843-844, enforced, 142 F.2d 1009, 1010 (C.A. 5), cert. denied, 323 U.S. 730, as follows:

The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. *Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline* (emphasis supplied).

Accord: *N.L.R.B. v. Essex Wire Corp.*, 245 F.2d 589, 593 (C.A. 9); *Republic Aluminum Co. v. N.L.R.B.*, ___ F.2d ___ (C.A. 5) (*en banc*), 68 LRRM 2090 (No. 22,716, April 25, 1968), vacating 374 F.2d 183; *Campbell Soup Co. v. N.L.R.B.*, 380 F.2d 372, 373 (C.A. 5); *N.L.R.B. v. United Aircraft Corp.*, 324 F.2d 128, 130-131 (C.A. 2).

At the hearing, the Company contended that its total ban on union activity at the plant was justified by "security" needs arising

from its use of valuable metals and its occasional handling of classified work.⁸ In explanation, Supervisor Winterbourne testified that the distribution of union literature inside the gate might cause congestion and thereby interfere with the guard's checking of badges. However, traffic averaged only ten employees a minute at the beginning of the shift, with no more than six approaching the gate at the same time (R. 24; Tr. 270, 237, 241; R. Exh. 2(a)-2(i)). This small volume of traffic was hardly calculated to cause disorder at the gates even if the solicitors had stationed themselves immediately inside. And, had congestion developed, the solicitors could have been relocated a little further from the gate. Significantly, neither the guards nor Company officials ever indicated to the solicitors that fear of congestion was behind the broad ban on solicitation and distribution. On the other hand, Company representatives several times interfered with solicitors even though they were outside the gates where no problem of congestion could arise. Under these circumstances, the Board properly found that the Company had failed to establish that its ban against the distribution of union cards inside the gates was "imposed because of traffic situation at the gate," and that in any event problems created by such activity "would not justify the broad prohibition" the Company sought to maintain (R. 24).

The Company's attempt to justify its interference with employees who sought to pass out union cards in the lunchrooms has even less substance. According to the Company, it feared that if cards

⁸As noted in the Statement, the Company was not engaged in classified production at the time of the events herein.

were distributed in the plant it might inadvertently commit an unfair labor practice when its gate guards discovered them in employees' brief cases and lunch boxes. But, as the Board said, "An inadvertent discovery of an authorization card in the possession of an employee would not be considered an unfair labor practice, and the prohibition against bringing cards into the plant and distributing them in nonwork areas during nonworking time is not justified as a means of avoiding the inadvertent discovery of the cards" (R. 29).

The Company also argued before the Board that its rule was a permissible limitation on organizational activities at the plant because other avenues of communication with employees were available to the Union. However, the availability of alternative channels of communication is a relevant consideration only where *nonemployees* seek to solicit or distribute union literature on Company property. While an employer may prevent such activity on his property if other methods are available, "[n]o restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." *N.L.R.B. v. Babcock & Wilcox Co.*, 351 U.S. 105, 112-113. Earlier, in *Republic Aviation, supra*, 324 U.S. at 798-799, the Supreme Court found similar rules unlawful even though in neither of the two cases decided could it "properly be said that there was evidence or a finding that the plant's physical location made solicitation away from company property ineffective to reach prospective union members." Moreover, *Republic Aluminum Co. v. N.L.R.B.*, 374 F.2d 183 (C.A. 5), heavily relied upon by the Company, has recently been reversed by the Fifth Cir-

cuit, sitting *en banc*, *supra*, p. 10, 68 LRRM 2090. Under circumstances similar to those here, the Fifth Circuit held that the General Counsel need not show that alternative methods of solicitation were lacking. 68 LRRM at 2092. Furthermore, of the other four circuits faced with this specific contention, three have rejected it. *United Steelworkers of America, AFL-CIO (Luxaire, Inc.) v. N.L.R.B.*, ___ F.2d ___ (C.A. D.C., No. 21,043, decided March 19, 1968, 67 LRRM 2813, 2814, 2815); *N.L.R.B. v. United Aircraft Corp.*, 324 F.2d 128, 130 (C.A. 2), cert. denied, 376 U.S. 951; *Time-O-Matic, Inc. v. N.L.R.B.*, 264 F.2d 96, 101 (C.A. 7); *contra*, *N.L.R.B. v. Rockwell Mfg. Co.*, 271 F.2d 109 (C.A. 3).⁹

In sum, the Company has failed to show that specific circumstances existed which justified its presumptively invalid total prohibition of distribution and solicitation on behalf of the Union at the plant, or that any other reasons call for a reversal of the Board's conclusion that the Company's ban violated Section 8(a)(1) of the Act.

⁹*Rockwell* turns on the Third Circuit's conclusion that the Supreme Court in *N.L.R.B. v. United Steelworkers Union of America, CIO (Nutone)*, 357 U.S. 357, made the existence of adequate alternative means of solicitation a relevant consideration in appraising any no-solicitation rule, although its earlier decisions in this area, as shown, had expressly held otherwise. In rejecting this reading of *Nutone*, the Fifth Circuit pointed out (*Republic Aluminum, supra*, 68 LRRM at 2092) that *Nutone* "does not purport to overrule or modify *Republic Aviation*" and expressed its reluctance to "read into [*Republic Aviation*] such a serious modification" of settled law.

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) BY INDUCING EMPLOYEES TO REVOKE THEIR AUTHORIZATION CARDS

As the Statement shows, on July 14 the Company sent its employees a letter suggesting that coercion and deception were the Union's organizational stock in trade, and advising that employees who had been "misinformed, coerced, threatened, [or] intimidated into signing an authorization card," could revoke it by mailing to the Board "the enclosed postcard." The postcard, stamped and addressed to the Board's Twenty-First Region in Los Angeles, informed the Board that the signer "revoke[d his] authorization for all purposes." The Board found nothing unlawful in the letter but properly held that the distribution of the revocation forms, without any request from the employees, violated Section 8(a)(1) of the Act.

It is an unfair labor practice under Section 8(a)(1) of the Act for an employer "to interfere with, restrain, or coerce" employees in their choice of a bargaining agent. The language and legislative history of Section 8(a)(1) show that Congress intended the terms "interfere," "restrain," and "coerce" to have separate and distinct meanings.¹⁰ In banning "interference" Congress clearly meant to proscribe any employer activity which might limit employees in the exercise of their statutory rights.¹¹ "The test is whether the em-

¹⁰See Senate Committee on Education and Labor, Hearings on S. 2958, 74th Cong., 1st Sess. (1935) pp. 713-714, 558, 305; H.R. No. 245 on H.R. 3020, 80th Cong., 1st Sess. (1947) p. 28.

¹¹Looking back after four years of experience under the Wagner Act, at a time when amendments to Section 8(a)(1) were urged but not adopted, Senator Wagner made this observation on the need for continuing the prohibition against interference:

ployer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.” *N.L.R.B. v. Ford*, 170 F.2d 735, 738 (C.A. 6). Accord: *Hendrix Mfg. Co. v. N.L.R.B.*, 321 F.2d 100, 105 (C.A. 5); *Melville Confections, Inc. v. N.L.R.B.*, 327 F.2d 689, 692 (C.A. 7), cert. denied, 377 U.S. 933; *Local 542, Operating Engineers v. N.L.R.B.*, 328 F.2d 850, 850-852 (C.A. 3); *N.L.R.B. v. Illinois Tool Works*, 153 F.2d 811, 814 (C.A. 7); *N.L.R.B. v. Syracuse Color Press*, 209 F.2d 596, 599 (C.A. 2), cert. denied, 347 U.S. 966. See also *N.L.R.B. v. Link-Belt Co.*, 311 U.S. 854; *N.L.R.B. v. Burnup and Sims, Inc.*, 379 U.S. 21.

It is a recognized form of unlawful interference “for an employer to . . . induce employees to sign . . . any form of union repudiating document . . .” *N.L.R.B. v. Birmingham Publishing Co.*, 262 F.2d 2, 7 (C.A. 5); *N.L.R.B. v. V. C. Britton*, 352 F.2d 797, 798-799 (C.A. 9); *N.L.R.B. v. Elias Bros., Big Boy Inc.*, 327 F.2d 421, 422 (C.A. 6); *Movie Star, Inc.*, 145 NLRB 319, 320, enforced, 361 F.2d 346 (C.A. 5); *Murray Envelope Corp.*, 130 NLRB 1574, 1577-1579; *Lakeland Cement Co.*, 130 NLRB 1365, 1366; *F. C. Huyck & Sons*, 125 NLRB 271, 272-273. This is not to say, of course, that an employer may not freely communicate its antiunion opinions to employees, including those who have already given a union their support. Nor does an employer intrude upon protected rights where it furnishes minimal assistance to employees who have

The ban against “interference” has been of central importance in protecting the right to organize * * * since it embraces a multitude of activities which would not be reached by specific prohibitions written into law, and would not be included within the range of such narrower concepts as “restraint” or “coercion.” 84th Cong., Rec., 76th Cong., 1st Sess. (1939) A.2053.

independently decided to withdraw their support and approach the employer for help. E.g., *N.L.R.B. v. Brookside Industries*, 308 F.2d 224, 226 (C.A. 4). Here, however, no claim is made that any employees had approached the Company to complain of union misconduct or to ask assistance in recovering their authorization cards. Thus, the Board could properly conclude that the Company's sole motive for sending employees the revocation cards was to induce and assist them to repudiate the Union and that this conduct constituted interference within the meaning of Section 8(a)(1) of the Act.

Before the Board, the Company argued that its conduct was protected by Section 8(c) of the Act. That section, however, protects only the "expressing of views, arguments or opinion,"—not interference with employees' affairs through "solicitation calculated to undermine the Union." *N.L.R.B. v. Clearfield Cheese Co., Inc.*, 213 F.2d 70, 73 (C.A. 3). See also, *N.L.R.B. v. Miller*, 341 F.2d 870, 873 (C.A. 2); *N.L.R.B. v. Raymond Pearson*, 243 F.2d 456, 457 (C.A. 5); *Irving Air Chute Co. v. N.L.R.B.*, 350 F.2d 176, 180 (C.A. 2). The Company's letter attacking the integrity of the Union was licensed as an expression of opinion, e.g. *N.L.R.B. v. TRW-Semiconductors, Inc.*, 385 F.2d 753 (C.A. 9), but its action in furnishing employees an instrument with which to nullify their selection of the Union was plainly something more.

CONCLUSION

For the reasons stated above, we respectfully submit that a decree should issue enforcing the Board's order in full and denying the Company's petition for review.

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National Labor Relations Board.

June, 1968.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et. seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

* * *

APPENDIX B

Pursuant to Rule 18(f) of the rules of the Court

GENERAL COUNSEL'S EXHIBITS

<u>No.</u>	<u>Identified</u>	<u>Received</u>
1(a) through 1(1)	6	6
2 and 2(a)	62	63
3	63	73
4	64	149

RESPONDENT'S EXHIBITS

<u>No.</u>	<u>Identified</u>	<u>Received</u>
1	177	178
2(a) through 2(h)	203	204
2(i)	245	246

JOINT EXHIBITS

<u>No.</u>	<u>Identified</u>	<u>Received</u>
1	58	58
2	58	59

No. 22811

IN THE

JUL 12 1968

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE DEUTSCH COMPANY, ELECTRONIC COMPONENTS
DIVISION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Review and Set Aside an Order of the
National Labor Relations Board.

Brief for the Deutsch Company, Electronic
Components Division.

FILED

JUN 25 1968

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THE DEUTSCH COMPANY, ELECTRONIC COMPONENTS
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Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Review and Set Aside an Order of the
National Labor Relations Board.

**Brief for the Deutsch Company, Electronic
Components Division.**

JURISDICTION.

This case is before the Court upon the petition of the Deutsch Company, Electronic Components Division (hereinafter called the "Deutsch Company") to review and set aside an order of the National Labor Relations Board (hereinafter called the "Board") issued against the Deutsch Company on May 31, 1967 following proceedings under Section 10(c) of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*).¹ The Board's decision and order are reported at 165 N.L.R.B. No. 5.

¹Pertinent provisions of the Act are set forth *infra* in Appendix A.

This Court has jurisdiction over the proceedings under Section 10(f) of the Act, since the alleged unfair labor practices occurred at Banning, California, within this judicial district, where the Deutsch Company is engaged in business. The Board has filed a Petition for Enforcement with this Court, under case number 22753, to enforce the Board's order here in question.

STATEMENT OF THE CASE.

I.

Issues Before the Board.

The issues before the Board were the lawfulness of the Deutsch Company's rule permitting distribution of union literature on company property, except for a specific area, and the lawfulness of the Deutsch Company mailing to its employees a card which the employee could sign and mail to the Board revoking any union authorization cards. The Deutsch Company contended that it was lawfully justified in permitting distribution of union literature on Deutsch Company property, except for a specific area. The Deutsch Company further contended that its mailing of information advising employees of their right to withdraw any authorization cards previously signed, is a lawfully protected activity. The Board found that the Deutsch Company maintained and enforced an unlawfully broad rule prohibiting solicitation and distribution of literature on behalf of a union during non-working time in non-work areas of the plant allegedly in violation of Sections 8(a)(1) and (3) of the Act. The Board further found that the Deutsch Company unlawfully attempted to assist employees to revoke their union authorization cards allegedly in violation of Section 8(a)(1) of the Act.

A. Factors Leading to the Deutsch Company's Permitting Distribution of Union Literature Except in a Specific Area of Its Plant.

The Deutsch Company is engaged in the production and sale of miniature electrical connectors used in the aerospace industry [G.C. Exh. 1(e), 1(g), Tr. 186].² In its production process, the Deutsch Company is required to plate various products with gold, cadmium, silver, platinum and other precious metals. These metals are kept in stock at the plant in quantities having great monetary value [Tr. 123, 186]. The building in which the plating is performed has an open rail grate floor which is used to recover excess plating materials. The floor is so constructed that the valuable metals are accessible to the employees in the building [Tr. 124-125]. The Deutsch Company also has an outdoor storage area. This area is not enclosed and is used as storage space for chemicals, maintenance supplies, pipes, tools and other materials and equipment [Tr. 184].

The Deutsch Company organized its present security system in 1961 [Tr. 185]. The primary objectives were to: (i) maintain in-plant security for the company's products, precious metals, supplies and employees, and (ii) maintain standards which would not threaten the loss of the Deutsch Company's Department of Defense security clearance [Tr. 193-194].

As a part of its security program, the Deutsch Company designated a portion of its plant as a security

²Reference abbreviations are as follows: "Tr": portion of the stenographic transcript. "G.C. Exh.": Exhibits of the General Counsel. "Resp. Exh.": Exhibits of Respondent. "Jt. Exh.": Exhibits jointly offered by General Counsel and Respondent. "TXD": Trial Examiner's Decision.

area, encompassing generally those areas in which the company's valuable metals are stored or used, its unenclosed storage supplies are maintained and any secret or security plans or information are in use or stored. The security area is completely enclosed with steel fencing, topped with barbed wire. Ingress and egress to and from the security area is regulated at all times. At gates that are always open, a guard is maintained twenty-four hours a day. Where a full time guard is not maintained, the gates are padlocked at all times when the guards are absent. Access to reception areas is similarly regulated [Tr. 178-183].

In order to control admission into the security area, all persons entering the security area are required to obtain and wear badges. No one is permitted into the security area unless he has an appropriate badge on his person and it is seen by the guard. The badges are color coded to distinguish between employees and non-employees, and among employees the badges are further color coded to indicate the area in which they normally work, and in some instances, as mechanics, the type of work performed. The badges and color coding system enable the security personnel to quickly determine if a person can be admitted in to the security area and whether he is at a location within the security area in which he has reason to be [Tr. 187-190].

In addition to the foregoing procedures, the Deutsch Company's security program uses personal inspections to insure that valuable materials, products or information are not removed from the security area. No one can leave the security area with a package unless he has written authorization. Briefcases, lunch boxes and similar objects must be opened and inspected upon re-

moval from the security area. Without prior notice, periodic searches are made of all persons leaving the security area [Tr. 192].

The Deutsch Company was initially granted a security clearance by the Department of Defense on February 27, 1961. It was administratively terminated on June 27, 1966. The Department of Defense was requested by a subcontractor to reactivate the Deutsch Company's clearance on July 12, 1966. The clearance was reissued on October 26, 1966 [Tr. 12-15]. At the time of the hearing of this matter, the Deutsch Company was maintaining classified information at its plant [Tr. 252-253].

Since 1961, the Deutsch Company has had in effect and enforced a rule prohibiting all solicitation and all distribution of literature on behalf of any organization on company property within the security area and generally on all company property. The rule was based in large part on the desire to reduce the number of people entering and leaving the security area, particularly with packages and papers, as well as avoiding people congregating in areas they would not normally have business and avoiding crowd control problems, all of which problems would interfere with the enforcement of the Deutsch Company's security program. The rule has been uniformly and non-discriminatorily enforced at all times as against all organizations within the security area and generally as to all company property, other than activities by employees of the Deutsch Company related to unions [Tr. 196-198]. As to the latter activity, the rule has not been enforced against union solicitation or distribution activity on Deutsch Company property, except that distribution of litera-

ture on Deutsch Company property is not permitted within the security area.³

B. Violation of the Deutsch Company's Regulation.

On June 3, 1966 two Deutsch Company employees distributed union authorization cards to employees entering through the east gate into the security area. The two stood inside the security area approximately five feet west of the gate entrance, facing each other. At times they stood so close together as to make it difficult for entering personnel to pass between them, causing congestion at the gate entrance. Depending on the number of people approaching the gate at one time, the resulting congestion made it difficult or impossible for the guards to inspect incoming people for appropriate badges [Tr. 211, 216-218, 241, 246].

An assistant personnel manager for the Deutsch Company advised the two employees that company rules

³The rule reads:

"Collections and Gifts:

The solicitation of funds for any purpose, the sale of tickets for all purposes, the operation of lotteries and raffles, and the solicitation of membership in organizations during working hours on company property are absolutely prohibited." [Jt. Exh. 2, p. 15].

As stated, as applied to union activity, the rule was never enforced as broadly as it appeared on its face. There was no evidence of any restriction upon discussions within the security area or distribution activities on company property outside of the security area. The employees understood the true scope of the rule as applied to union organizational activity and operated within its provisions without proscription by the Deutsch Company [TXD 7]. Subsequent to the disciplining of employees who violated the rule in issue, employees distributed literature on company property in accordance with the Deutsch Company's rules on more than ten separate occasions without incident [Tr. 77-78, 89-90].

required them to distribute their literature just outside of the gate entrance. A large employee parking lot is maintained for company employees just outside of the gate and the men could distribute their literature to employees in the lot as they approached to enter the gate [Resp. Exh. 1, Tr. 178-183]. The men refused to move outside of the gate and were given warning notices [Tr. 176, 201].

Thereafter, between June 4, 1966 and July 8, 1966, at least five different employees of the Deutsch Company distributed union literature outside of the gates leading to the security area on more than ten separate occasions without restriction by the Deutsch Company [Tr. 88-90, 118, 156-157]. Additionally, prior to the foregoing incident and any warning about the Deutsch Company's rules, union supporters had on many occasions voluntarily distributed union literature outside of the gates leading into the security area [Tr. 130-131].

On July 8, 1966, two employees, at different times, passed out union authorization cards in a lunchroom located within the security area of the Deutsch Company's plant. Shortly thereafter, they were interviewed at the personnel office by a personnel manager who informed each of them that they had acted in violation of the Deutsch Company's rules and each was given a disciplinary layoff until the following Wednesday [Tr. 79-83, 120-122].

**C. Mailing Cards to Employees Which Could Be Used to
Revoke Union Authorization Cards.**

About July 14, 1966 the Deutsch Company sent a letter to its employees with a postcard enclosed [G.C. Exh. 2, 2(a), Tr. 61-63]. The letter said, in part:

“If you have changed your mind, been misinformed, coerced, intimidated into signing an authorization card OR if you think someone may have sent in a card with your name on it, you can revoke that card by mailing the enclosed postcard.”

The card was addressed to the National Labor Relations Board and stated:

“Re: Deutsch Electronic Components Division
Gentlemen:

Recently I signed a union representation card of the United Steelworkers of America because of misinformation or duress.

I hereby revoke my authorization for all purposes.

Signature

Dated”

ARGUMENT.

I.

The Deutsch Company Justifiably Regulated the Distribution of Union Literature by Its Employees Within the Security Area When Such Distribution Unduly Interfered With the Enforcement of Its Security Program.

The Board and the Courts have long recognized that an employer may restrict some or all union organizational activity on all or part of its property when such a restriction is justified by the circumstances. *N.L.R.B. v. Walton Manufacturing Company*, 289 F. 2d 177 (5th Cir. 1961). In determining whether the restriction is justified, the facts of the individual case must be evaluated, including the basis for the restriction, the scope of the restriction and whether it has been discriminatorily applied. Under circumstances less compelling than those here present, the Board and the Courts have sustained restrictions much broader in their scope than those involved here.

In *N.L.R.B. v. Reeves Broadcasting & Development Corporation*, 336 F. 2d 590 (4th Cir. 1964) the employer enforced a rule prohibiting any discussion relating to union activity at any time on any part of the company's premises. The court held the following facts sufficient to justify the imposition of the broad rule enforced by the employer: (a) The employer's operation of a radio station required split second timing; (b) There was a lack of space for any discussion; and (c) There was a union hall just across the street at which any such activities could be carried on.

In *Stuart F. Cooper Co.*, 136 N.L.R.B. 142 (1962) the employer prohibited union solicitation on any com-

pany property at any time. 136 N.L.R.B. at 148-149. The Board held that prohibition justified because there had been bickering and an air of hostility created by pro and anti-union organizational activity, with some employees threatening to quit, notwithstanding the fact that the degree of disturbance was far less intense than commonly found in such situations.

In *N.L.R.B. v. Enid Cooperative Creamery*, 169 F. 2d 986 (10th Cir. 1948) the Court held that a rule forbidding any solicitation on company property at any time was justified because the organizational activity had apparently resulted in one fight.

The facts in *N.L.R.B. v. Threads, Inc.*, 308 F. 2d 1 (4th Cir. 1962) presented a unique reason for the imposition of restrictions which in its business justification is indistinguishable from the situation in which the Deutsch Company found itself. In *Threads*, the employer was engaged in fabric dyeing and its success depended upon maintaining the secrecy of the formulas that were used in its business. The employer engaged in extensive surveillance and inspection of notes made by employees in its plant in order to enforce a rule forbidding the writing of notes or removing them from the plant at any time. The charging party contended that the rule interfered with his ability to engage in union activities on company property. The Court held that the employer's business operations justified the imposition of the rule, surveillance to determine if it was being complied with, and inspection of notes written by employees to insure that the rule was obeyed.

In applying the foregoing factors to the present case, the following facts are significant. The rule as orig-

inally promulgated and thereafter enforced by the Deutsch Company, was not discriminatory in intent or effect. It applied generally to all activities with equal force, except for union activity and as to such activity, it was less broadly enforced. As applied to union activity, the Deutsch Company's rule does not, as the Board characterized it, prohibit organizational activity at any time on company property. In fact it does not prohibit any solicitation with respect to the union on company property. Similarly, it does not prohibit distribution of union literature on company property, except distribution within the security area. In contrast than to the Deutsch Company's long standing, non-discriminatory, uniformly enforced rule generally prohibiting solicitation or distribution of literature on company property on behalf of any organization other than a union, as to unions, the company permitted solicitation and distribution on company property except within the security area.

There is ample justification for the minimal restriction contained in the liberalized rule that applied to union activity. The Deutsch Company had instituted and maintained a security program, which included a badging system, to protect its property and to protect classified information which it from time to time had in its possession. The company used many precious metals in its production process and kept supplies on hand having great monetary value. In addition, many materials were stocked in an open storage area to which all persons allowed within the security area had access. Classified information was stored at the plant both prior and subsequent to the time in question. The Deutsch Company maintained essentially the same se-

curity program in force at all times since the necessity to protect its own property was always present and it was easier to maintain a set pattern than to periodically re-educate its employees as to the security procedures to be followed from time to time.

Distribution of union literature just inside the gates leading into the security area was causing congestion at the gates as people backed up because their entrance into the security area was being slowed as they were forced to pass single file past the persons engaged in distribution. The jamming resulted in making it difficult and occasionally impossible for the guards to determine if the people entering into the security area were authorized to be there. If the Deutsch Company's rules were not then enforced, the same difficulty in maintaining security at the gates could be anticipated as employees left at the end of their shifts.

Other physical circumstances of the plant and the operation of the security program contributed to the necessity for a prohibition against distribution within the security area. As previously indicated, many of the company's products and the materials used in the manufacturing process were of a small physical dimension, but of substantial monetary value. As a part of the company's procedures, anyone seeking to leave the security area was subject, at random times, to personal inspection. In addition, all packages, briefcases and other containers were always required to be inspected prior to being taken out of the security area. Maintenance of the security program would be inherently disrupted by people bringing in and removing packages from the security area and having papers passing from person to person in various parts of the plant.

Inspection of people and packages would uncover possession of literature, including authorization cards. The union and the concerned employees would not want this information to come to the attention of the Deutsch Company. Similarly, the Deutsch Company would not want to be the recipient of this information, even though uncovered by chance, since, among other problems thereby created, the union might attempt to bring unfounded unfair labor practice charges. Such distribution would also tend to attract employees to places in the security area that they would normally not be present at, making more difficult control over the parts of the security area a person was permitted to be in.

All of the foregoing actual and potential problems were the very ones envisioned by the company in promulgating the original rule and in applying the more liberal interpretation to union activity. In order to alleviate the existing and potential serious impairments to its security program, the Deutsch Company requested the persons engaged in distribution to make a minuscule change in their procedure. That is, distribute their literature on company property just outside of the gates leading into the security area. While not entirely accommodating the requirements for enforcement of the Deutsch Company's security program, the liberal rule enforced by the Deutsch Company represents the best solution under the circumstances and should be held to be lawfully justified.

II.

The Deutsch Company Reasonably Regulated the Right to Distribute Literature When Such Regulation Was Justified by the Requirements of Its Business, Such Distribution Was Permitted on All but One Specific Area of Company Property, There Is No Evidence That There Were Not Adequate Alternative Means for Distribution of Literature and the Evidence Affirmatively Demonstrates That There Were Adequate Alternative Means.

The Deutsch Company submits that its regulation of distribution activities by the union on a part of its property is valid and proper in view of the abundant evidence of justification for the rule, as discussed hereinabove. However, a number of court decisions have indicated that in determining the lawfulness of a restriction of organizational activity on company property, the court should not work in a void by looking solely to the justification for the regulation. Rather, realizing that the issue basically involves a weighing of the competing interests of the property owner to regulate the use of his property and the employees to have reasonable opportunities to engage in organizational activities, these courts have held that the scope of the regulation and its effect on opportunities for organizational activity must be assessed as well as the justification for the regulation.

In *N.L.R.B. v. Rockwell Mfg. Co.*, 271 F. 2d 109 (3rd Cir. 1959) the employer's plant was located in an urban area, having highways and broad sidewalks on

two sides. Parking lots were available to employees immediately adjacent to entrances to the plant. Originally, union literature was distributed on the sidewalks as employees entered the parking lot. Subsequently, employees requested to be allowed to distribute such literature on the parking lots. The company refused this request and an unfair labor practice charge was filed by the union. The Court held that the Board failed to consider the fact that there might be alternative means of communication available, pointed out the various possibilities existing under the facts, and denied enforcement.

In *Korn Industries v. N.L.R.B.*, 389 F. 2d 117 (4th Cir. 1967) the employer prohibited distribution of literature on behalf of any organization on company property. The employer interpreted this rule less broadly as to union literature distributed by its employees and permitted distribution in the parking lot area of the company's premises and the posting of such literature on a union bulletin board. The company justified the rule as being necessary to prevent fire hazards. An employee was discharged for violating the rule by distributing literature in a doorway in a non-working area of the plant. The Court refused to enforce the Board's finding that the rule was unlawful. The Court pointed out that the issue of the presence of satisfactory alternative means of distribution was not presented since the company did not prohibit all distribution on company property. The Court further stated that the scope of the company rule and its effect on organizational

activity, as well as the justification for the rule, must be considered together. So considered, the court held that the rule was valid in view of the minimal nature of the restriction, the alternative means for distribution available both on and off company property and the justification for the restriction.

The Board itself has succinctly stated the spirit reflected by the foregoing decisions in *General Electric Co.*, 163 NLRB No. 31 where the issue was the propriety of the company forbidding the solicitation of funds on company property to aid another local. The Board stated:

“In striking a balance, as we must, between the Respondent’s right to control its own property and the competing right of employees guaranteed in Section 7, we are not prepared to say that the union’s interest in using Respondent’s premises to collect support money in behalf of striking employees at another plant and in another bargaining unit so outweighs the Respondent’s interest in controlling its property as to render unlawful in the specific circumstances of this case Respondent’s application of the rule herein involved.”

The combined factors present in *Korn Industries* and *Rockwell* are present here. The Deutsch Company’s regulation was non-discriminatory, granted union adherents far greater rights than any other group and permitted substantial union activity on company property, restricting only distribution activities and permitting even that activity on all but a part of company

property. Further, sufficient alternative means of distribution are readily available, both on and off company property. The Deutsch Company plant is surrounded on three sides by public sidewalks, where distribution activity could be carried on. The main parking lot was adjacent to the plant and all employees entering on this lot would normally enter the security area from the east or north gate. The employees were allowed to use the parking lot and could engage in their activities from just outside these gates, as employees passed into and out of the gates, as effectively as they could inside the security area. The other gate leading into the security area was adjacent to the Banning Airport. While fewer employees used this gate, the sidewalk and airport property adjacent to this gate was accessible to employees for their purposes. As in *Rockwell*, the union here initially voluntarily engaged in distribution activity in areas permitted by the regulation. There was no evidence that these areas were unsatisfactory or disabled the carrying on of such activity. After the rule was enforced, employees again used these available areas on and off company property, as a base for distribution of literature. While ample opportunity was presented, no one indicated that any of these areas were even less than satisfactory for such purposes. In addition to the foregoing facts, there was no evidence presented demonstrating any inability to adequately and effectively conduct desired organizational work by mail, at public meetings, by personal contact after work and in private homes.

When the justification for the regulation, its minimal effect on organizational activity, the large area of activity still permitted and the alternative methods for distribution available are all considered, the Deutsch Company's regulation is a lawful regulation which is consistent with and does not unduly infringe on the Deutsch Company's right to conduct its business and its employees' rights to engage in organizational activity. Such a determination reflects the balancing of competing interests approved by the Supreme Court in *Adderly v. Florida*, 385 U.S. 39 (1966). There the Court, weighing the competing values of free speech and assembly on the one hand, and the right of the owner of property to regulate the use of his property, ruled that the latter interest must prevail. The Court pointed out that an owner of property has a right to preserve the property he owns for the use to which it is lawfully dedicated. The appellants contended that they had a right to go upon the property because they were going there to exercise their right to free speech and assembly. The Court "vigorously and forthrightly rejected" that argument stating:

"Such an argument has as its major unarticulated premise the assumption that people who want to propagandize or protest have a constitutional right to do so whenever and however and wherever they please." 385 U.S. at 47-48.

III.

The Deutsch Company May Lawfully Advise Its Employees of Their Rights Under the National Labor Relations Act, Including the Manner in Which They May Revoke Union Authorization Cards Which Were Obtained by Coercion or Similar Means, When the Advice Is Given by Mailing a Letter to the Employees at Their Home so That the Company Cannot Know of the Employees' Reaction, the Letter Does Not Contain Any Threat or Promise to Induce the Employees to Revoke an Authorization Card and the Response Cards Are Addressed Directly to the Board so That the Company Will Not Know What the Employees Do With the Card.

An employer, under the "free speech" provision of section 8(c) of the Act, has the right to advise its employees of the way that they can indicate their rejection or repudiation of a union and its employees have a right to receive this information, notwithstanding the objections of a union. The sole restriction is that the communication must not contain any threats or coercion. Here the letter mailed by the Deutsch Company to its employees merely advised the employees that they need not sign a card, that if they did sign one, in view of the disadvantages of a union and the use a union could make of a card and the circumstances under which some cards had been obtained, they could revoke it in a designated manner. The card enclosed with the letter was addressed directly to the Board so that the Deutsch Company would not be advised of the employee's decision.

In each case where the employer has been found to have committed an unfair labor practice in connection

with revocation of authorization cards, there has been the use of threats or force to obtain revocation or the discussion of whether to revoke the card occurred under circumstances where the employee's decision would be communicated to the employer, thereby applying indirect pressure to the employees' freedom of choice. The Board found that none of these factors were presented here [TXD 12].

In each case where the foregoing factors have not been present and all that the employer did was to advise its employees of the law and make available to them, in a non-coercive manner, the means to revoke authorization cards if they so desired, the Board and the courts have held the employer's action to be protected activity.

In *Perkins Machine Co.*, 141 N.L.R.B. 697 (1963) the employer sent a letter to each of its employees advising them of the procedure by which they could revoke their authorization cards. The Board said that the right to give this information was protected and since there was no coercion in the letter or the surrounding circumstances, there was no basis to object to the employer's conduct.

Similarly, in *N.L.R.B. v. Brookside Industries, Inc.*, 308 F. 2d 224 (4th Cir. 1962) the employer's personnel director advised some employees how to revoke their authorization cards. The Court ruled that there had been no unlawful threats or promises, merely an explanation of the employees' rights, and that such activity was protected.

A related factual situation was presented in *N.L.R.B. v. Sun Co. of San Bern.*, 215 F. 2d 379 (9th Cir.

1954). The employer advised its employees "that those employees who had signed ITU authorization cards could cancel such authorization cards by merely writing the ITU or its representative requesting that such authorizations be cancelled" (See 103 N.L.R.B. 359 at 369). The Court held that such statements were protected.

In *Carolina Mills, Inc.*, 92 N.L.R.B. 1141 (1951) the Board held protected the employer's statement that

"I hear some of the hands are signing with the union. I don't know whether you are or not, but I advise the best thing to do if you have is to tear up your slip and tell them you don't want any part of the union."

In view of the clear statutory favor given to the employees' right to hear, unrestricted, all sides on the issue of organizational activity, the Deutsch Company should be protected in expressing its position with regard to joining a union and in advising its employees of the action they can take if they agree with the company's point of view.

Conclusion.

For the reasons stated, it is respectfully submitted that the petition to review and set aside the Board's order should be granted.

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FOSTER TEPPER



APPENDIX A.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, et seq.) are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

. . . .

- (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

. . . .

Sec. 8(c) The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such

order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

APPENDIX B.

This appendix is prepared pursuant to Rule 18(f) of the Rules of the Court. References are to pages of the stenographic transcript.

No.	Identified	Received
	General Counsel's exhibits	
	6	6
	62	63
	Respondent's exhibits	
	177	178
	Joint exhibits	
	58	59

Nos. 22,753 and 22,811

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United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

THE DEUTSCH COMPANY, ELECTRONIC COMPONENTS
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Respondent.

On Petition for Enforcement and on Petition to Review and
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Reply Brief for the Deutsch Company, Electronic
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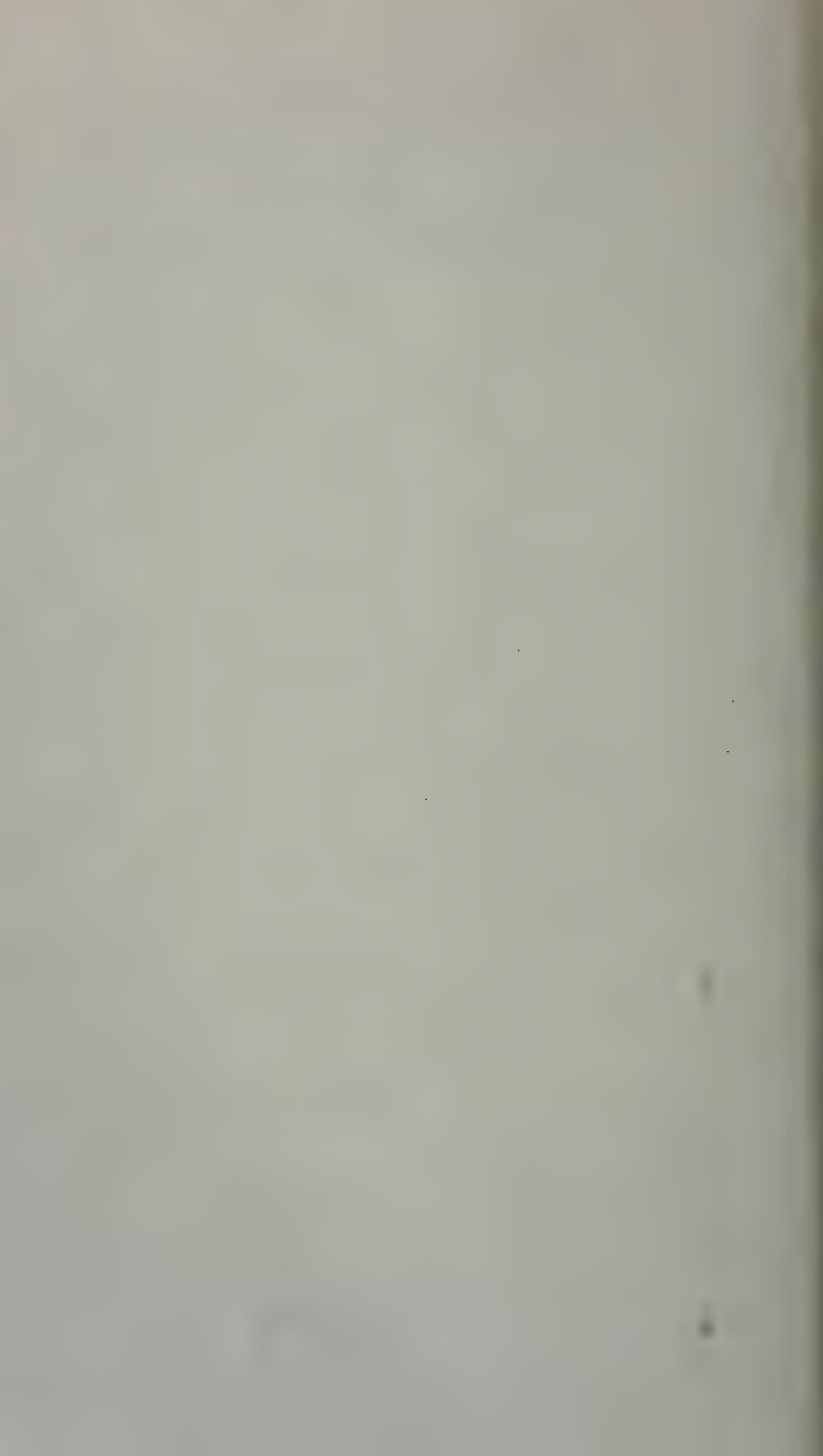
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ARGUMENT.

I.

Substantial Evidence on the Record as a Whole
Shows That the Deutsch Company Lawfully
Regulated Distribution of Union Literature
With the Minimal Restraint Required by the
Circumstances.

The Board argues that there is substantial evidence
to support its finding that the Deutsch Company unlaw-
fully prohibited solicitation or distribution on behalf of
the union anywhere on the plant premises at any time,

without justification. However, the Board's finding as to the scope of the Deutsch Company's regulation, both as to the area of the Deutsch Company's plant and the organizational activities covered, as well as the Board's finding as to the alleged lack of justification for the regulation, is without support of substantial evidence on the record as a whole. Additionally, the Board failed to apply the appropriate legal standards to determine the lawfulness of the limited regulation in fact carried out by the Deutsch Company.

A. Scope of Activities Regulated.

The Deutsch Company did not regulate any organizational activity other than distribution of literature. There was no regulation of discussions or any other organizational activities engaged in on behalf of the union during non-working time. The rule published in the Deutsch Company's Welcome Manual was in its apparent scope broader than the regulation in fact exercised over union organizational activity. Because of the ostensible scope of the published rule, the Board's Complaint alleged that the Deutsch Company had promulgated an unlawfully broad "no solicitation" rule. However, the Deutsch Company's objection that any claim of an unfair labor practice based upon the mere promulgation of the published rule was barred by the six month limitation period of Section 10(b) of the Act was recognized and the allegation stricken from the Complaint [Tr. 6, 58-59]. There is no evidence that subsequent to the date of promulgation of the published rule, the Deutsch Company ever enforced the published rule, or any other rule as to union organizational activity, other than to regulate distribution of literature within the security area.

B. Territorial Scope of Regulation.

The limited regulation in fact exercised by the Deutsch Company over distribution of literature did not apply to all company owned property; only company property within the security area was affected. Employees were free to, and did engage in distribution activities at entrances to company property and on company property at entrances to the security area. While at one period of time some employees were erroneously cautioned about distribution activities in these permitted areas, such errors were quickly corrected by management and no employee suffered any discrimination by reason of such activities. The Board expressly found that such regulation as was exercised, was applicable only to activity in the security area and that the Deutsch Company's employees understood the true territorial scope of such regulation [TXD 7].

C. Justification for the Limited Regulation in Fact Exercised.

The Board refers to a few specific examples of difficulties the Deutsch Company contends would exist if it were not permitted to continue the limited regulation exercised by it, and concludes that they are insufficient to justify the regulation. However, the Board has failed to consider the full extent of the problem presented to the Deutsch Company if the proposed organizational activity is allowed in the security area. The Deutsch Company enforces security standards to maintain the secrecy of its product development, prevent theft, safeguard its classified materials and to protect its property and employees. The problems created by the proposed organizational activity arise because distribution of union literature within the security area is

fundamentally incompatible with the Deutsch Company's maintenance of its required standards of security. It is impossible for the Deutsch Company to maintain its security control when numbers of people bring into the security area and distribute large amounts of materials, with the crowding, congestion and disruption in routine, orderly company procedures which must inevitably accompany such activities. Congestion at the gates, difficulty in seeing if appropriate badges are possessed, mingling in areas where people normally do not belong, increased problems in controlling materials being brought into and leaving the security area and problems arising from applying normal security procedures to people possessing union materials are not all, but only some of the problems the Deutsch Company seeks to avoid by its regulation of union distribution activities in the security area. Because of the fundamental conflict between the proposed organizational activity and maintenance of the desired level of security in the security area, the Deutsch Company enforced the regulation in issue in the security area. Because of this irreconcilable conflict, the Board erred in finding that the Deutsch Company's regulation was not justified, even without consideration of the limited scope of regulation and the alternative means to carry on distribution activities available to the union, hereinafter argued.

D. The Board Failed to Apply the Appropriate Legal Standards to Determine the Lawfulness of the Deutsch Company's Limited Regulation.

The Board argues that the regulation exercised by the Deutsch Company is invalid because it prohibited organizational activity on company property during non-working time. But as shown, the Deutsch Com-

pany did not regulate anything other than one limited form of organizational activity, distribution of literature, and that only on a designated part of company property. The Board's erroneous finding as to the extent of the regulation resulted in the Board failing to consider the fact that the Deutsch Company's regulation was greatly limited in scope, in determining whether circumstances existed to justify the Deutsch Company in exercising its limited regulation.

Where regulation of distribution activities is limited in scope, less compelling circumstances need be established to justify such regulation than would be necessary to validate a total proscription of organizational activity on company property. *Korn Industries v. NLRB*, 389 F. 2d 117 (4th Cir. 1967). In *Korn Industries* the court recognized that in regulating the competing desires of the employer to control the uses to be made of its property and of the employee to be free to engage in organizational activities, there must be a weighing of the competing interests. There, the court held that since the employer's regulation only affected a part of its property and alternative means of carrying on organizational activity were available, the employer's regulation, growing out of a desire to protect its property, would be recognized.

The approach of weighing the reasons for the regulation against its effect on organizational activity has long been recognized by the courts. Thus in *Republic Aviation Corporation v. National Labor Relations Board*, 324 U.S. 793, which established the presumptive invalidity of a total ban of organizational activities on company property, the court stated that the issue involved "working out an adjustment between the undis-

puted right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments.” 324 U.S. at 797-798. As the court stated, “Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society.” 324 U.S. at 798.

Since resolution of the issue of whether the right to engage in organizational activity on company property should exist at all involved weighing of the competing interests of the employer and employee, it seems only fair and logical that in resolving conflicts between these interests in a particular situation, it is implicitly necessary to weigh on the one hand, the degree to which the employer’s operations require it to enforce certain regulations with regard to the use of its property and, on the other hand, the effect of any such regulation on the exercise of the employee’s organizational rights. And when the necessity for the Deutsch Company’s regulation and its limited scope are weighed against its negligible effect on union organizational activities, the regulation should be found to be justified.

In addition to not considering the fact that the Deutsch Company’s regulation was limited in scope, the Board refused to take into account the presence of adequate alternative means of distribution in determining if the Deutsch Company’s regulation was justified. As the Board points out, the circuits have differed on whether the General Counsel must establish a lack of alternative means of carrying on organization-

al activity as a part of its case that the employer's regulation is invalid. Since, as pointed out above, the development and application of the rules relating to the use of an employer's property for organizational activity involved weighing the competing interests of the employer and employees, the proper rule is, as *NLRB v. Rockwell Mfg. Co.*, 271 F. 2d 109 holds, that the presence or absence of satisfactory alternative means of communication must be considered in first determining whether the employer's regulation is justified under all of the circumstances of the case.

Some of the circuits have merely ruled that the General Counsel need not show the presence or absence of such other means of distribution as a part of establishing his case. But here, the Deutsch Company has affirmatively established the presence of adequate alternative means for distribution. Not only was it shown that such means existed and could be exercised on company property, but it was proven that union organizers had voluntarily and successfully used these means both prior to the Deutsch Company's enforcement of its regulation and, without hindrance or evidence of any diminished effectiveness, after the Deutsch Company enforced its regulation. Nevertheless, the Board refused to consider the evidence of such alternatives in determining whether the Deutsch Company's minimal regulation was valid.

In view of the fact that only one type of organizational activity was regulated at all, and that only on a part of the Deutsch Company's property, and the further fact that satisfactory alternative means for distribution are available, when the nominal infringement on organizational activity resulting from the Deutsch Com-

pany's regulation is weighed against the logical and imperative business necessity for such regulation, the regulation must be held to be justified and valid under all of the circumstances.

II.

The Deutsch Company Lawfully Advised Its Employees of Their Right to and the Method by Which They Could Terminate Any Authorization Card Outstanding in Their Name.

The Deutsch Company mailed a letter to its employees which advised them that the Deutsch Company had learned that some employees had been tricked or deceived into signing authorization cards. The letter then informed them that if they had executed a card for either of the foregoing reasons they could revoke the card. Incidental to sending the letter, and as a part of informing its employees of the way in which they could revoke their authorization card in the event any of the foregoing circumstances existed, the Deutsch Company enclosed a post card with the letter. The post card was addressed to the Board's regional office and simply stated the senders desire to revoke his outstanding authorization card. The Board properly concluded that the letter was an expression of opinion protected by Section 8(c) of the Act. Since the post card was mailed with the letter and was merely an incidental means of assisting the Deutsch Company in expressing its position, the mailing of the card should be entitled to the same protection as the sending of the letter.

Even in the position it takes, the Board acknowledges that the post cards did not restrain or coerce the Deutsch Company's employees within the meaning of Section

8(a)(1) of the Act. However, the Board concludes that the cards do interfere with the Deutsch Company's employee's rights within the meaning of the Act.

No categorical definition of what is interference within the meaning of Section 8(a)(1) can be made. But an examination of the cases relied upon by the Board clearly indicates the kind of conduct intended to be proscribed.

In *NLRB v. Link-Belt Co.*, 311 U.S. 584 the Supreme Court stated that there was interference within the meaning of the Act when there was: "the existence of conditions or circumstances which the employer created or for which he was fairly responsible and as a result of which it may reasonably be inferred that the employees did not have that complete and unfettered freedom of choice which the Act contemplates." 311 U.S. at 588. In *Link-Belt* the court found that there was interference by the employer because of its favoritism and assistance to one of the two competing unions seeking to organize the company's employees.

In its brief the Board states that interference exists when: "the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act."

The facts in the cases cited by the Board fill out these definitions of interference.

In *NLRB v. Ford Bros.*, 170 F. 2d 735 the court sustained findings of interference and coercion because of the employer's discharge of a known union adherent, allegedly for violation of a rule never previously announced or enforced, as well as because of threats of discrimination against union members, attempts to

deal individually with employees and threats to discharge union adherents.

Similarly in *Hendrix Mfg. Co. v. NLRB*, 321 F. 2d 100 supervisors warned employees that if the union were to win, bonuses, pensions and holiday pay would be curtailed and as a part of these acts, urged employees to solicit anti-union votes from other employees.

And in *Melville Confections, Inc. v. NLRB*, 327 F. 2d 689 a finding of interference, coercion and restraint was sustained because the employer conditioned the right to membership in its profit sharing plan to non-membership in a union.

In *Local 542, Operating Engineers v. NLRB*, 328 F. 2d 850 the union was found to have violated Section 8(b)(1) by threatening bodily injury and damage to property in an attempt to gain support of other employees during a strike.

Also in *NLRB v. Illinois Tool Works*, 153 F. 2d 811 the court supported the Board's finding of interference, restraint and coercion growing out of the employer's questioning its employees about the extent of their and other employees' union activity, refusing to deal with representatives of the employees, and enforcing an unlawfully broad, unjustified rule against solicitation on company property.

In *NLRB v. Syracuse Color Press*, 209 F. 2d 596 the court refused to sustain the Board's finding of interference, restraint and coercion arising solely out of the employer's interrogating its employees as to the scope of their union activity. Instead, the Board's order was sustained because the court found that in fact, the interrogation was carried out in a coercive atmosphere.

Finally, in *NLRB v. Burnup and Sims, Inc.*, 379 U.S. 21 the Court held that Section 8(a)(1) is violated by an employer's good faith discharge of an employee for alleged misconduct arising out of a protected activity, when the misconduct in fact never occurred. The Court stated that a contrary ruling would result in the loss of immunity for protected activity.

In each of the foregoing cases, although many did not rest their decision solely on "interference", there was inherent in the conduct held unlawful, some actual or potential threat of preventing employees from exercising their own free choice of representatives. Thus, in the context of employer action advising employees of their right to revoke their authorization cards, there must be something in the employer's conduct which at least threatens to deny the employee his free choice, before the employer's conduct can be found to be interference within the meaning of Section 8(a)(1) of the Act. The authorities cited by the Board relating to employer action to encourage their employees to withdraw from the union support this position.

In *NLRB v. Birmingham Publishing Co.*, 262 F. 2d 2 the employer's attempt to have its employees withdraw from a union was held unlawful because a supervisor personally passed around a decertification petition and promised salary raises and other benefits to employees who signed the petition.

Similarly in *NLRB v. V. C. Britton*, 352 F. 2d 797 the court held unlawful the company's attempt to encourage its employees to sign a petition to repudiate the union, because, among other things, the employees were told the company would close down and discharge its employees if the union won.

In *NLRB v. Elias Bros. Big Boy, Inc.*, 327 F. 2d 421 the employer interrogated employees with regard to the extent of their union activities and personally attempted to get them to sign letters withdrawing from the union.

Finally in *NLRB v. Movie Star, Inc.*, 361 F. 2d 346 the employer sought to induce employees to withdraw from the union by furnishing them facilities to procure signatures and sought to induce them to sign by engaging in systematic threats to close the plant and to discharge employees who remained members of the union, if the union was not withdrawn.

The Board's brief recognizes that it is interference with the employees' free choice that is condemned by Section 8(a)(1), when they state: "It is a recognized form of unlawful interference 'for an employer to . . . induce employees to sign . . . any form of union repudiating document . . .'" (Emphasis added). Even the Board decisions cited involve circumstances which effectively deprived the employees of their free choice. Thus, in *Murray Envelope Corp.*, 130 NLRB 1574 the employer handed employees cards announcing their withdrawal from the union, or that they were happy that they had never joined, and instructed them to sign and return the cards. Also in *Lakeland Cement Co.*, 130 NLRB 1365 the employer encouraged and assisted an employee to personally contact, on company time, other employees and obtain their withdrawal from the union. And in *F. C. Huyck & Sons*, 125 NLRB 271 the employer informed its employees that they could come to him and he would assist them in withdrawing from the union.

Thus, in all of the cases relied on by the Board the employer performed acts which clearly coerced and tend-

ed to deprive the employees of their freedom of choice as to whether or not to sign. No such facts are present here. The Board expressly found that the letter accompanying the post cards, which advised the employees of their rights, was privileged and not unlawful. The only added ingredient was the presence of the post cards. The writing on the post cards was certainly innocuous. Nothing related to the mailing of the post cards, or their disposition could in any way deprive employees of their free choice of action with respect to the post cards or their authorization cards. The Board's apparent position that the mere furnishing of the post cards, in itself, is unlawful interference, even though it does not interfere with the employees' free choice, is unsupported by any authority and as indicated, has been rejected by the courts, as in *NLRB v. Syracuse Color Press*, 209 F. 2d 596.

While the Board may believe that the employer's act of presenting information to its employees is made more effective by enclosing the post card, it cannot, merely because it is more effective, declare the conduct illegal. This approach by the Board has also been rejected. Thus, in *Southwire Co. v. NLRB*, 383 F. 2d 235 the court refused to enforce the Board's finding that the employer's showing of the motion picture "And Women Must Weep" was a violation of Section 8(a)(1). Although decided under Section 8(c) rather than 8(a)(1), the following statement of the court is highly relevant here: "It is true that the film is highly emotional and that its impact against unions is probably strong but we do not believe that free speech is limited to non-emotional or non-impact speech." Just as in *Southwire*, so here, the Deutsch Company's conduct in furnishing

its employees with post cards does not interfere with their freedom to select a bargaining agent and cannot therefore be a violation of the Act.

Conclusion.

For the reasons set forth above, it is respectfully submitted that the court should refuse to enforce the Board's order.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAY 22 1969

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

THE DEUTSCH COMPANY, ELECTRONIC COMPONENTS DIVISION,
Respondent

*On Petition To Review and Cross-Petition
for Enforcement of an Order of the
National Labor Relations Board*

PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING IN BANC

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MAY 9 1969

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UNITED STATES COURT OF APPEALS

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Nos. 22,753 & 22,811

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

THE DEUTSCH COMPANY, ELECTRONIC COMPONENTS DIVISION,
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*On Petition To Review and Cross-Petition
for Enforcement of an Order of the
National Labor Relations Board*

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

The National Labor Relations Board respectfully petitions the Court to grant rehearing, and suggests rehearing in banc, of the decision entered in this case on April 8, 1969. In that decision a panel of the Court (Circuit Judges Chambers and Koelsch, and District Judge Von Der Heydt) held that the violations found by the Board were too "trivial" to warrant enforcement of the Board's remedial order. We submit that such discounting of the unfair labor practices found here is unjustified, and that the Court's refusal to enforce the Board order exceeds the established limits

of judicial review of Board orders and is inconsistent with decisions of this and other courts of appeals.

1. It is an unfair labor practice for an employer to prohibit his employees from soliciting union membership or distributing union literature on their free time and in nonwork areas, unless "special circumstances make the rule necessary in order to maintain production or discipline." *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 803, n. 10 (1945), quoting from *Peyton Packing Co.*, 49 NLRB 828, 843-844, enforced 142 F.2d 1009, 1010 (C.A. 5, 1945), cert. denied, 323 U.S. 730.¹ Beyond dispute, the Company maintains and enforces a rule forbidding employees from soliciting for a union or passing out union literature on Company property (except in one parking lot) *at any time*. Thus, since 1962 a rule in the Company's orientation booklet has prohibited "the solicitation of membership in organizations during working hours on Company property" (R. 21; Exh. 2). After the Union's current organizing campaign began, several employees received written warnings when, prior to the commencement of work, they attempted to pass out union authorization cards while standing just inside a plant gate.² About the same time, two employees who distributed authorization cards in the plant lunchroom during their respective lunch periods received three-day disciplinary layoffs (R. 29; Tr. 79-83, 119-121, 205-208, 225-226, 250-252). The Board found that the

¹Accord: *N.L.R.B. v. Essex Wire Corp.*, 245 F.2d 589, 593 (C.A. 9, 1957); *Republic Aluminum Co. v. N.L.R.B.*, 394 F.2d 405 (C.A. 5, 1968) (*in banc*); *Campbell Soup Co. v. N.L.R.B.*, 380 F.2d 372, 373 (C.A. 5, 1967); *N.L.R.B. v. United Aircraft Corp.*, 324 F.2d 128, 130-131 (C.A. 2, 1963), cert. den., 376 U.S. 951.

²The warning stated: "It is forbidden to hand out Union literature within the Deutsch plant during working hours *or rest periods*" (emphasis supplied), and threatened the employees with discharge for "continued infractions" of the rule. A similar notice was posted on the plant bulletin board (R. 29; Tr. 82-84, 117-118).

Company had failed to show a legitimate reason for its total ban on union activity in the plant (R. 13-14).³ The Board therefore concluded that the Company's no-solicitation and no-distribution rules violated Section 8(a)(1) of the Act and that the disciplinary suspension given two employees violated Section 8(a)(3).⁴ The Board issued a conventional order directing the Company to cease and desist from the violations found, including "maintaining and enforcing an unlawful broad rule prohibiting solicitation and distribution of literature on behalf of the Union during nonworking time in nonworking areas of the plant" (R. 32).

2. We submit that on no permissible scale of evaluation can the violations herein be deemed too minimal to warrant relief.⁵ This is not a case of an isolated and completed act of misconduct. The Company's rule, actively enforced, is a continuing bar against employees engaging in union activity in lunch rooms, rest areas, and elsewhere in the plant on their own time. The cease and desist order is not only appropriate but essential to effectuate the statutory policy to protect union activity at the employees' place of work, consistent with the employer's reasonable needs.

³According to the Company, the distribution of Union literature in the vicinity of the plant gates might cause congestion and hinder the checking of badges by guards. The Board noted, however, that traffic at the gates never exceeded ten employees a minute and that this reason was never mentioned to the employees. The Board also rejected the Company's explanation for banning the distribution of authorization cards in its lunchrooms—that its guards might see the cards in the employees' lunch boxes during a gate check—noting that such inadvertent discovery of union material "would not be considered an unfair labor practice" (R. 29).

⁴The Board also found that the Company violated Section 8(a)(1) by giving its employees improper assistance in the revocation of executed authorization cards (R. 29-31).

⁵The Company has never contended that, if its conduct was violative of the Act, it was too trivial to justify the Board's remedial order.

3. By refusing to enforce this order, the panel has patently overstepped the bounds of the reviewing authority conferred by the Act. As the Supreme Court has repeatedly admonished, “the relation of remedy to policy is peculiarly a matter for administrative competence [and] courts must not enter the allowable area of the Board’s discretion.” *Phelps-Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194 (1941).⁶ It is for the Board, once it has found that unfair labor practices have been committed, to determine whether effectuation of the statutory policies requires the issuance of a remedial order barring such practices.⁷ Indeed, at least two circuits have held that the Act *requires* the Board to issue a cease and desist order once it has determined that a person has committed unfair labor practices.⁸ But, whatever the allowable limits of the Board’s discretion in this area, once it determines a remedy is necessary and orders “an appropriate remedy, a like obedience to the statutory law on the part of the Court of Appeals requires the court to grant enforcement of the Board’s order” where, as here, the Board’s unfair labor practice findings are clearly supported by the record. *N.L.R.B. v. Bradford Dyeing Ass’n*, 310 U.S. 318, 343 (1940).⁹ The Court’s scope of review is even “more

⁶ Accord: *N.L.R.B. v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 271 (1938); *I.A.M. v. N.L.R.B.*, 311 U.S. 72, 82 (1940); *N.L.R.B. v. Falk Corp.*, 308 U.S. 453, 461 (1940); *Franks Bros. v. N.L.R.B.*, 321 U.S. 702, 704 (1944); *Int’l Ladies Garment Workers’ Union v. N.L.R.B.*, 366 U.S. 731, 735, 736, 739-740 (1961); *Fibreboard Corp. v. N.L.R.B.*, 379 U.S. 203, 216 (1963).

⁷ See e.g., *Atlas Storage Division, P & V Atlas Industrial Center, Inc.*, 112 NLRB 1175, 1180 (1955), enforced *sub nom.*, *Chauffeurs, Teamsters, etc., Local 200 v. N.L.R.B.*, 233 F.2d 233 (C.A. 7, 1956) (no order necessary to remedy an isolated threat against one employee in a large unit).

⁸ *Int’l Woodworkers of America, Local 3-10 v. N.L.R.B.*, 380 F.2d 628, 630-631 (C.A. D.C., 1967); *Eichleay Corp. v. N.L.R.B.*, 206 F.2d 799, 805 (C.A. 3, 1953).

⁹ Accord: *N.L.R.B. v. Int’l Union, Progressive Mine Workers*, 375 U.S. 396 (1964), summarily reversing 319 F.2d 428 (C.A. 7); see *N.L.R.B. v. Warren Co., Inc.*,

limited” with respect to a “simple cease and desist order,” for “whatever may be the broader policies of the Act, the compelling policy which we may not thwart is the Congressional determination that certain acts are illegal and must be enjoined.” *Eichleay Corp. v. N.L.R.B.*, *supra*, 206 F.2d at 805.

4. The panel’s decision is also contrary to this Court’s decision in *N.L.R.B. v. Essex Wire Corp.*, *supra*, 245 F.2d 589. There, as here, the employer maintained an unlawful broad no-solicitation rule which prohibited, *inter alia*, union solicitation during employees’ rest periods.¹⁰ Unlike the case at bar, the Essex employer expressly contended that the incidents charged against it, even if unlawful, were “isolated and sporadic,” so that “issuance of a cease and desist order [was] nevertheless unwarranted”, *supra*, at 593. Rejecting this contention, the Court observed that “the incidents, while few in number, involved more than isolated and chance remarks, interrogations, or warnings later repudiated and never enforced” (*supra*, at 594). The Court acknowledged that “the Company’s basic policy with respect to such union activity” may have been “fair and proper” but held that “the criticized practices were of a nature which warranted the Board in characterizing them as unlawful and in ordering that respondent cease and desist” (*ibid.*).

350 U.S. 107, 112 (“where the Board has acted properly within its designated sphere, the Court is required to grant enforcement of the Board’s order”); see also, *N.L.R.B. v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 567-568 (1950); cf. *N.L.R.B. v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961).

¹⁰The Board found as separate 8(a)(1) violations incidents wherein supervisors ordered one employee to surrender signed authorization cards in his possession (*supra*, at 592), and ordered another to remove her union button (*supra*, at 591, 593).

CONCLUSION

For these reasons, the case should be reheard, either by the panel, or in banc, and, after such rehearing, a decree should be entered enforcing the Board's order.

Respectfully submitted,

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May 1969.



